No. 06-1321
Title: Myrna Gomez-Perez, Petitioner
v.
John E. Potter, Postmaster General
Docketed: April 3, 2007
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (06-1614)
Decision Date: February 9, 2007
Rehearing Denied: March 20, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Mar 30 2007	Petition for a writ of certiorari filed. (Response due May 3, 2007)
Apr 26 2007	Order extending time to file response to petition to and including June 4, 2007.
May 30 2007	Order further extending time to file response to petition to and including July 5, 2007.
Jul 3 2007	Order further extending time to file response to petition to and including July 24, 2007.
Jul 24 2007	Brief of respondent John E. Potter, Postmaster General in opposition filed.
Jul 24 2007	Brief amicus curiae of AARP filed.
Aug 7 2007	Reply of petitioner Myrna Gomez-Perez filed. (Distributed)
Aug 8 2007	DISTRIBUTED for Conference of September 24, 2007.
Sep 25 2007	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of amici curiae are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.
Oct 30 2007	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including November 13, 2007. The time within which to file respondent's brief on the merits is extended to and including December 20, 2007. A reply brief, if any, is due on or before January 22, 2008. Briefs of amici curiae are due on or before 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.
Nov 13 2007	Joint appendix filed (Statement of costs received).
Nov 13 2007	Brief of petitioner Myrna Gomez-Perez filed.
Nov 19 2007	Brief amicus curiae of AARP filed.
Nov 20 2007	Brief amicus curiae of National Treasury Employees Union filed.
Dec 20 2007	Brief of respondent John E. Potter, Postmaster General filed.
Dec 21 2007	SET FOR ARGUMENT ON Tuesday, February 19, 2008.
Jan 11 2008	Record received from U.S.C.A. for the 1st Circuit. (1 envelope)
Jan 14 2008	Record received from U.S.D.C. for the District of Puerto Rico. (1 box)
Jan 18 2008	CIRCULATED.
Jan 22 2008	Reply of petitioner Myrna Gomez-Perez filed. (Distributed)
Feb 19 2008	Argued. For petitioner: Joseph R. Cuerra, Washington, D.C. For respondent: Gregory G.

Garre, Deputy Solicitor General, Department of Justice, Washington, D.C.

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No. 06-

IN THE

Supreme Court of the United States

MYRNA GOMEZ-PEREZ,

Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal-sector provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633a, prohibits retaliation against employees who complain of age discrimination.

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PETITION FOR A WRIT OF CERTIORARI

Myrna Gomez-Perez hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in *Gomez-Perez* v. *Potter*, 476 F.3d 54 (Feb. 9, 2007).

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the First Circuit is reported at 476 F.3d 54 and is reproduced at Petitioner's Appendix ("Pet. App.") 1a-10a. The opinion of the court of appeals denying the petition for rehearing and rehearing en banc, dated March 20, 2007, is reproduced at Appendix 33a. The opinion of the United States District Court for the District of Puerto Rico, dated Feb. 28, 2006, is unreported and is reproduced at Appendix 11a-32a.

JURISDICTION

The opinion and judgment of the court of appeals were issued on February 9, 2007. A timely petition for rehearing and rehearing en banc was denied on March 20, 2007. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The First Circuit had jurisdiction of this case pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISION INVOLVED

The federal-sector provision of the Age Discrimination in Employment Act mandates that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age" in specified departments and agencies of the Federal Government "shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). This provision is set forth in full at Appendix 34a-37a.

INTRODUCTION

This case presents the question whether the federal-sector provision of the Age Discrimination in Employment Act ("ADEA") prohibits retaliation against federal employees who complain of age discrimination. The court of appeals held that it does not. In so ruling, it disregarded this Court's decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), and created a square and acknowledged conflict with the D.C. Circuit's decision in *Forman* v. *Small*, 271 F.3d 285 (D.C. Cir. 2001).

When it extended the ADEA to the federal sector, Congress did not simply subject federal agencies to the same provisions that govern private employers. Instead, Congress drafted a broad, stand-alone provision, which states that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a).

In *Jackson*, this Court held that, as a matter of plain meaning, a virtually identical phrase in Title IX—"discrimination" "on the basis of" sex—encompasses retaliation against those who complain of sex discrimination. The Court explained that, even though Congress expressly barred retaliation in Title VII and did not mention it in Title IX, this discrepancy provided no basis for narrowing Title IX's plain meaning. Congress's decision to supplement detailed and differently worded proscriptions in Title VII's private employer provisions, the Court ruled, said nothing about the scope of Title IX's more broadly worded prohibition.

Jackson thus ratified the reasoning the D.C. Circuit had used in concluding that § 633a(a) bars retaliation. Like the *Jackson* Court, the D.C. Circuit recognized that, by its plain terms, a broadly worded prohibition on "any discrimination based on age" prohibits "a reprisal for an age discrimination

charge." *Forman*, 271 F.3d at 296 (internal quotation marks omitted). And, like the *Jackson* Court, the D.C. Circuit refused to limit § 633a(a)'s broad prohibition based on the express retaliation ban in the ADEA's private employer provisions. The latter provisions—which were modeled on Title VII's private employer provisions—were "narrowly drawn," and thus, unlike the sweeping language of § 633a(a), they would not bar retaliation without an express prohibition. *Id.*

Despite these precedents, the First Circuit ruled in this case that § 633a(a) does not prohibit retaliation. In so ruling, the First Circuit employed reasoning that is flatly inconsistent with this Court's decision in *Jackson*. The First Circuit's holding also creates a square and irreconcilable conflict with the D.C. Circuit's decision in *Forman*. This Court's intervention is necessary to bring the First Circuit into conformity with *Jackson*, to resolve the conflict between the circuits, to effectuate Congress' objective of eradicating age discrimination from the federal workplace, and to ensure that the thousands of federal employees working in the jurisdictions covered by the First Circuit enjoy the protection from retaliatory age discrimination that Congress provided for in § 633a and that federal employees working in the nation's capital possess.

STATEMENT OF THE CASE

On February 22, 2003, petitioner Myrna Gomez-Perez, a 45-year-old window distribution clerk in the Moca, Puerto Rico Post Office, filed an equal employment opportunity ("EEO") complaint against the United States Postal Service ("USPS"). In that complaint, petitioner alleged that she had been discriminated against on the basis of her age when her supervisor denied her request for a transfer from her part-time position in the Moca Post Office to the full-time position she previously held in the Dorado Post Office.

After filing her EEO complaint, petitioner, who previously had an exemplary 15-year record with the USPS, was subjected to a series of reprisals. She was called to meetings at which groundless charges of sexual harassment were leveled against her. She was harassed and mocked by co-workers. USPS posters concerning sexual harassment were defaced and her name was written on them. And her hours were drastically reduced.

On November 18, 2003, petitioner filed the instant case, alleging, *inter alia*, that respondent had violated § 633a(a) of the ADEA by retaliating against her for filing an age discrimination complaint. Respondent moved for summary judgment. The district court, adopting the report and recommendation of a magistrate judge, granted respondent's motion on the ground that the ADEA did not waive the USPS's sovereign immunity with respect to retaliation claims.

The court of appeals affirmed, though on different grounds. It held that the USPS's "sue and be sued clause," 39 U.S.C. § 401(1), waived the agency's sovereign immunity, but that § 633a(a) does not provide "a cause of action for retaliation as the result of having filed an age-discrimination related complaint." Pet. App. 10a.

In support of the latter conclusion, the court of appeals offered essentially three reasons. First, the court believed that "the plain text of § 633a" did not prohibit retaliation. Pet. App. 4a-5a. Disregarding *Jackson*'s analysis of virtually identical statutory language, the First Circuit reasoned that § 633a(a) "clearly prohibits discrimination against federal employees (over forty years old) based on age, but says nothing that indicates that Congress meant for this provision to provide a cause of action for retaliation for filing an age-discrimination related complaint." *Id.* at 5a. The question, according to the court of appeals, is whether Congress meant "'discrimination *and retaliation*' when it said 'discrimination'?" *Id.*

Second, the court reasoned that a cause of action for retaliation is distinct from a cause of action for discrimination. "The clear difference between a cause of action for discrimination and a cause of action for retaliation leads to the conclusion that if Congress had meant to provide for both causes of action, it would have said so explicitly in § 633a." Pet. App. 5a.

Third, the court drew a negative inference from 29 U.S.C. § 623, the ADEA provision governing private employers. Because § 623(d) provides an explicit cause of action for retaliation, whereas § 633a(a) merely prohibits "any discrimination based on age," the court concluded that "Congress intended for the ADEA to prohibit retaliation by private employers, but not by federal employers." Pet. App. 7a-8a.

The court rejected petitioner's argument that this Court's decision in *Jackson* required a different result, deeming *Jackson* inapposite for three reasons. First, the court thought it significant that, "in *Jackson*, the Court was interpreting a judicially-created cause of action that was implied from Title IX," whereas here the court was "constrained by the fact that Congress explicitly created a statutory cause of action in § 633a, but did not include retaliation in that cause of action." Pet. App. 6a. In so reasoning, the First Circuit ignored *Jackson*'s express recognition that, even though the private right of action under Title IX had been judicially implied, the scope of the substantive prohibition that is enforced in such an action is defined by the statute's text.

Second, the court asserted that *Jackson* was premised in part on the fact that, in the Title IX context, a retaliation cause of action is necessary to protect teachers and coaches, who are often in the best position to identify and report discrimination. Pet. App. 6a-7a. Federal employees such as petitioner, the court surmised, "can hardly argue that their coworkers are often in the best position to identify instances of age discrimination and bring it to the attention of [their] supervisors." *Id.* at 7a. This distinction, however, addresses a

separate holding in *Jackson* that did not concern whether the phrase "discrimination" "on the basis of" a protected status prohibited retaliation, but rather whether such a prohibition extended to persons outside the protected class.

Third, the court claimed that Congress passed Title IX "in response to" *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), in which this Court upheld a cause of action for retaliation for speaking out against race discrimination. Pet. App. 7a. Here, the court of appeals found "no evidence in the legislative history that the ADEA's federal sector provisions were adopted in a similar context of claims by federal employees for retaliation for speaking out against age discrimination." *Id.* *Jackson*, however, did not rely on Title IX's legislative history, but rather on a presumption of congressional intent that is no less applicable to § 633a than it was to Title IX.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because the decision below conflicts with this Court's decision in *Jackson* and the D.C. Circuit's decision in *Forman* on an important issue of federal law.

In *Jackson*, this Court held that Title IX's broadly worded proscription of "discrimination" "on the basis of sex" encompasses retaliation against those who complain of sex discrimination, even though Title IX does not specifically refer to retaliation. This is so, the Court concluded, because retaliation against those who complain of sex discrimination is itself a form of sex discrimination and thus falls within the statute's general proscription of "discrimination" "on the basis of sex."

In this case, the court of appeals held that the ADEA's public-sector provision, which prohibits "discrimination based on age," does not encompass retaliation against those who complain of age discrimination. This is so, the court

concluded, because § 633a refers only to "discrimination," not to "retaliation," and discrimination and retaliation are distinct wrongs for which Congress must provide distinct causes of action. There is thus an unmistakable and inescapable conflict between this Court's interpretation of Title IX in *Jackson* and the court of appeals' interpretation of § 633a(a)'s essentially identical language. The various reasons the court of appeals gave for distinguishing *Jackson* are entirely without merit. This Court should grant the petition to rectify the court of appeals' disregard of *Jackson*.

The court below also refused to follow the D.C. Circuit's decision in *Forman*, thus creating a square conflict between the rule governing federal employees in the First Circuit and the rule governing federal employees in the nation's capital. Given the interest in uniform treatment of federal employees, as well as Congress' strong policy of eradicating age discrimination from the federal workplace, the Court should grant the petition to resolve the conflict among the circuits and announce a clear and uniform rule prohibiting the federal government from retaliating against those who complain of age discrimination.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *JACKSON* v. *BIRMINGHAM BOARD OF EDUCATION*.

The decision below cannot be reconciled with this Court's decision in *Jackson*. There, the Court held that Title IX of the Civil Rights Act of 1964, which prohibits recipients of federal education funding from engaging in "discrimination" "on the basis of sex," prohibits retaliation against those who complain of sex discrimination. The Court noted that Title IX does not contain a separate prohibition on retaliation, but concluded that an express reference to retaliation was unnecessary because *retaliation against those who complain of sex discrimination is itself a form of sex discrimination*:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

544 U.S. at 173-74 (citations omitted).

The Court's interpretation of the words "discrimination" "on the basis of sex" in *Jackson* plainly controls here. The language of § 633a(a) is in all relevant respects identical to that of Title IX. There is no meaningful difference between a provision that bars "discrimination based on" a protected status and one that proscribes "discrimination" "on the basis of" a protected status.

Similarly, the absence of a separate and express prohibition on retaliation in § 633a(a) is no more reflective of a congressional intent not to prohibit retaliation than the absence of such an express prohibition was in Title IX. As in the case of Title IX, there was no need for Congress to prohibit retaliation expressly because *retaliation against those who complain of age discrimination is itself a form of age discrimination*. Retaliation against those who complain of age discrimination is "discrimination" because the complainant is being subjected to differential treatment. And retaliation is discrimination "based on age" because it is an intentional response to the nature of the complaint: an allegation of age discrimination. Thus, when an employer

retaliates against a person because she complains of age discrimination, this constitutes "discrimination based on age."

The court of appeals took no account of *Jackson*'s core holding that, as a matter of plain language, a prohibition on "discrimination" "on the basis of" a protected status prohibits retaliation against those who complain of such discrimination. Instead, the court began with precisely the opposite assumption—that retaliation is *not* a form of discrimination, but a separate and distinct wrong for which Congress must provide a separate and distinct cause of action. See Pet. App. 5a (§ 633a(a) "clearly prohibits discrimination" but "says nothing that indicates that Congress meant for this provision to provide a cause of action for retaliation"). This assumption reflects a fundamental misunderstanding of *Jackson* at best, and a flagrant disregard of *Jackson* at worst. After *Jackson*, it is simply not possible to maintain, as a matter of textual analysis, that a broad prohibition on discrimination "says nothing" about retaliation.

Instead of coming to terms with *Jackson*'s interpretation of the word "discrimination," the court of appeals brushed *Jackson* aside, arguing that *Jackson* is distinguishable on a variety of grounds. None of the lower court's purported distinctions, however, survives even cursory scrutiny.

First, the court of appeals found it significant that "in *Jackson*, the Court was interpreting a judicially-created cause of action that was implied from Title IX," and that "[t]he Court is the primary entity involved in defining the contours of that right of action." Pet. App. 6a (internal quotation marks and alterations omitted). Here, however, "Congress explicitly created a statutory cause of action in § 633a, but did not include retaliation in that cause of action." *Id.*

This reasoning is twice flawed. As an initial matter, it begs the question at issue—whether the express cause of action Congress provided in § 633a includes a cause of action for retaliation. More fundamentally, the court's distinction rests

on the erroneous notion that the scope of a statute's substantive prohibition depends on whether the cause of action for its enforcement is express or implied. While courts that imply a private right of action exercise law-making power in the sense that they create the right "to invoke the power of the court" to enforce that right, *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979) (defining a "cause of action"), the scope of the right that is enforced in a judicially-created cause of action is still defined by the statute itself. Determining the scope of that statutory right is thus an exercise in statutory interpretation—not an exercise of the judiciary's limited lawmaking power. Accordingly, the Court explained in *Jackson* that in "all of" the cases in which it has determined the scope of Title IX's prohibition, it "relied on the text of Title IX." 544 U.S. at 173. And that is what the Court did in *Jackson*. *See id.* at 175 ("'Discrimination' is a term that covers a wide ride of intentional unequal treatment; by using such a broad term, *Congress* gave the statute a broad reach.") (emphasis added); *id.* at 178 ("We reach this result based on the statute's text."). Thus, any distinction between § 633a(a) and Title IX must rest on the language that defines the statutes' substantive prohibitions, not on the express or implied nature of the causes of action that can be invoked to enforce those prohibitions. The lower court did not, because it could not, identify any meaningful difference between a statute that prohibits "discrimination" "on the basis of" a protected status and one that prohibits "discrimination based on" a protected status.

The court of appeals' second reason for distinguishing *Jackson* is equally untenable. The lower court asserted that

> the Supreme Court premised its holding in *Jackson* partially on the fact that Title IX prohibits discrimination in educational institutions, and that a retaliation cause of action would protect "teachers and coaches," who themselves were not the targets of discrimination, but who "are often in the best position to vindicate the rights

> of their students because they are better able to identify discrimination and bring it to the attention of administrators."

Pet. App. 6a-7a (quoting *Jackson*, 544 U.S. at 181). This rationale, the court concluded, does not apply here, because "employees such as Gómez can hardly argue that their co-workers are often in the best position to identify instances of age discrimination and bring it to the attention of supervisors." *Id.* at 7a.

This purported distinction of *Jackson* is demonstrably incorrect. Even accepting the court of appeals' assertion that the federal employees protected by § 633a(a) are in a better position to identify and report discrimination than students protected by Title IX, that fact provides no support for the court's distinction. *Jackson*'s discussion of teachers' and coaches' ability to identify and report discrimination was addressed to a *separate holding* in *Jackson*, a holding that is wholly irrelevant to the question presented here. In *Jackson*, the school board argued that, even if Title IX barred retaliation, that bar could not be invoked by a third-party, such as the male coach in that case, who was not the "victim of the discrimination that [was] the subject of the original complaint." 544 U.S. at 179. The Court rejected this argument, concluding that a bar on such third-party actions would frustrate the statute's purpose because it would discourage those in the best position to identify and report discrimination from doing so.

Thus, the discussion in *Jackson* that the court of appeals relied upon to distinguish that case was addressed to the issue of *who* may bring a retaliation claim, not whether retaliation is actionable in the first place. In concluding that retaliation is actionable under Title IX, *Jackson* did not rely on the need for third-party complaints, but instead found that the statute's proscription of "discrimination" "on the basis of sex" prohibited retaliation by its "clear terms." *Id.* at 183. This is the relevant rationale from *Jackson*, and it is fully applicable

to § 633a(a)'s materially indistinguishable language. The question whether a third party can bring an action for retaliation under § 633a is not presented here because, unlike the complainant in *Jackson*, petitioner is a member of the protected class and was the victim of the discrimination that was the subject of the original complaint. Accordingly, the court of appeals' second distinction, like its first, is utterly without merit.

The court's third ground for distinguishing *Jackson* fares no better. The court deemed *Jackson* inapposite because the Court stated in *Jackson* that Title IX was adopted "in response to the Court's holding in *Sullivan* . . . in which the Court upheld a cause of action for retaliating for speaking out against race discrimination." Pet. App. 7a (citation omitted). Here, by contrast, "there is no evidence in the legislative history that the ADEA's federal sector provisions were adopted in a similar context of claims by federal employees for retaliation for speaking out against age discrimination." *Id.*

The fundamental flaw in this argument is that *Jackson* did not say that Title IX was adopted "in response to" *Sullivan*. It stated that Title IX was enacted "just three years after *Sullivan* was decided, and accordingly that decision provides a valuable *context* for understanding the statute." *Jackson*, 544 U.S. at 176 (emphasis added). This Court cited no evidence from Title IX's legislative history showing that Congress was actually aware of *Sullivan*; it simply cited an earlier decision for the proposition that it was "realistic to presume" that Congress was aware of the then three-year old *Sullivan* decision. *Jackson*, 544 U.S. at 176 (quoting *Cannon* v. *University of Chi.*, 441 U.S. 677, 699 (1979)). The absence of references in the ADEA's legislative history to retaliation against federal workers thus provides no basis for distinguishing *Jackson*. To the contrary, *Jackson*'s "contextual" analysis applies to § 633a. Just as it is reasonable to presume that the 1972 Congress that enacted

Title IX was aware of a 1969 Supreme Court decision holding that retaliation is a form of discrimination, it is reasonable to presume that the 1974 Congress that enacted § 633a had the same awareness, and that it used the phrase "discrimination based on" a protected status to encompass the same types of conduct (including retaliation) that are encompassed by the virtually identical language of Title IX.

In short, the lower court's various distinctions cannot blunt the precedential force of *Jackson* here. *Jackson* holds that, by its plain terms, a statute that prohibits "discrimination" "on the basis of" a protected status prohibits retaliation against those who complain of such discrimination. The court of appeals ignored this holding and papered over *Jackson* with illusory distinctions. This Court should grant the petition to compel compliance with *Jackson* and to ensure that petitioner and other federal employees in the First Circuit are afforded the full measure of protection from age discrimination that Congress both intended and provided for in § 633a.

II. THE DECISION BELOW CONFLICTS WITH THE RULING OF THE D.C. CIRCUIT.

In addition to conflicting with this Court's decision in *Jackson*, the decision below creates a square conflict with the D.C. Circuit's decision in *Forman* v. *Small*, 271 F.3d 285 (D.C. Cir. 2001). In *Forman*, the D.C. Circuit held that § 633a creates a cause of action for retaliation. *Id.* at 295-99. The court below expressly refused to follow *Forman*. Pet. App. at 8a ("We must respectfully disagree with our brethren on the D.C. Circuit").[1]

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[1] Four other circuits have recognized the question whether § 633a prohibits retaliation, and three have indicated their agreement with the result reached in *Forman*. The Second and Fourth Circuits have suggested in dicta that § 633a prohibits retaliation. *See Bornholdt* v. *Brady*, 869 F.2d 57, 62 (2d Cir. 1989) ("it may be inferred that the breadth of the language of § 633a . . . is sufficiently broad to prohibit age-related retaliation"); *Miller* v. *United States*, 813 F.2d 402 (4th Cir. 1986) (per

The core of the disagreement between the D.C. Circuit and the court below is the meaning of § 633a(a)'s mandate that personnel decisions affecting covered federal employees be made "free from any discrimination based on age." As discussed *supra*, the court below assumed, in defiance of *Jackson*, that retaliation for filing an age discrimination complaint is not itself a form of "discrimination based on age." Pet. App. 5a ("The question is, did Congress mean 'discrimination *and retaliation*, when it said 'discrimination'?"). The D.C. Circuit, by contrast, correctly concluded, in reasoning that would later be echoed in *Jackson*, that the "sweeping" and "unqualified" language Congress used in § 633a(a) "encompasses a claim of retaliation because 'analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor.'" *Forman*, 271 F.3d at 296 (quoting *Siegel* v. *Kreps*, 654 F.2d 773, 782 n.43 (D.C. Cir. 1981) (Robinson, J., concurring in part and dissenting in part)).

The courts also disagree about the inference to be drawn from the ADEA's private sector provision, 29 U.S.C. § 623, which provides a distinct cause of action for retaliation.[2] The

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curiam) (unpublished), *available at* 1986 WL 16231, at *2 ("it seems clear that analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor"). The Tenth Circuit "has assumed the existence of . . . a cause of action" for retaliation under § 633a. *Villescas* v. *Abraham*, 311 F.3d 1253, 1258 (10th Cir. 2002). And the Sixth Circuit has noted both the question and the conflicting decisions it has produced. *See Scott* v. *Potter*, 182 F. App'x 521, 523 n.1 (6th Cir. 2006) ("There is a question . . . whether the federal government has waived sovereign immunity to claims of age-related retaliation by its employees. Courts have differed on the answer.").

[2] Section 623(d) provides that

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d).

court below reasoned that "[t]he absence of statutory language providing a claim for retaliation in § 633a(a), when compared with the explicit prohibition on retaliation in § 623(d), further supports the conclusion that Congress intended for the ADEA to prohibit retaliation by private employers, but not by federal employers." Pet. App. 8a. The D.C. Circuit, by contrast, found that "[n]othing in the plain language of § 633a suggests that Congress intended the federal workplace to be less free of age discrimination than the private workplace." *Forman*, 271 F.3d at 297. Instead, the D.C. Circuit concluded that the presence of a distinct cause of action for retaliation in the private-sector provision is not probative of the meaning of the federal-sector provision because the latter is a broadly-worded, stand-alone provision, whereas the former is a narrowly drawn provision that spells out the prohibited conduct in detail. See *id.* at 296 ("Unlike § 623, which is narrowly drawn and sets forth specific prohibited forms of age discrimination in private employment, Congress used sweeping language when it subsequently extended the ADEA to cover federal agency employees.").

Significantly, *Jackson* ratified the D.C. Circuit's reason for refusing to draw a negative inference from the presence of an express retaliation provision in the ADEA's private-sector provision. In *Jackson*, the Court refused to draw a negative inference from the presence of an express retaliation provision in Title VII. The Court explained that, while Title IX "is a broadly written general prohibition on discrimination," Title VII's private employer provisions "spell[] out in greater detail the conduct that constitutes discrimination in violation of that statute." *Jackson*, 544 U.S. at 175. Thus, the fact that Congress separately prohibited retaliation in the private employer provisions of Title VII did not show that Title IX's more broadly worded prohibition failed to prohibit retaliation. *Id.* ("Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to

mention one such practice does not tell us anything about whether it intended that practice to be covered."). *Jackson* makes clear that negative inferences cannot be drawn based upon comparisons between substantive prohibitions of very different scope.

This reasoning applies with particular force here. The ADEA's prohibitions on private employers "were derived *in haec verba* from" the private employer provisions of Title VII, *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978), and spell out the prohibited conduct in detail. Section 633a(a), by contrast, contains a broad prohibition virtually identical to Title IX's. What was true in *Jackson* is no less true here—because Congress did not list any specific discriminatory practices when it wrote § 633a, its failure to mention one such practice does not imply anything about whether it intended that practice to be covered. The court of appeals' contrary conclusion is symptomatic of its pervasive failure to come to terms with *Jackson*.[3]

III. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF FEDERAL LAW.

The question presented in this case involves an important issue of federal law. Congress has long recognized the importance of eliminating age discrimination in federal

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[3] The logical fallacy in the court of appeals' "negative inference" theory is further illustrated by § 623(e), which prohibits age discriminatory advertisements and notices for private employment. *See* 29 U.S.C. § 623(e). Under the lower court's theory, the lack of such an express prohibition in § 633a means that it does not bar the use of discriminatory notices or advertisements. But § 633a plainly does prohibit such practices: they are "personnel actions" that (1) "affect[] . . . applicants for employment" over 40 and (2) are not "free from any discrimination based on age." *Id.* § 633a(a). Because a ban on discriminatory advertising is simply superfluous in light of § 633a(a)'s broad scope, it would be improper to conclude that the inclusion of such an express prohibition in the ADEA's private employer provisions but not in § 633a somehow limits the scope of § 633a(a). The same is true for retaliation.

employment. When Congress expanded the ADEA to the federal government in 1974, it emphasized that age discrimination can be as invidious as any other form of discrimination, and that it is especially harmful in the workplace:

> "Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and denies the Nation[] the contribution they could make if they were working."

H.R. Rep. No. 93-913 (1974), *reprinted in* 1974 U.S.S.C.A.N. 2811, 2849.

Over the years, Congress has expanded the scope of § 633a. In 1978, for example, Congress eliminated the upper age limit for federal employees in order to end mandatory retirement in the federal sector. In so doing, Congress reiterated its strong policy that "as a matter of basic civil rights people should be treated in employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about race, sex, or age." S. Rep. No. 95-493, at 3 (1977), *reprinted in* 1978 U.S.C.C.A.N 504, 506.

Clearly, Congress views age discrimination in the federal workplace as an important issue of federal law. Just as clearly, a ban on retaliation is essential to accomplish Congress' objective of eradicating age discrimination from the federal workplace. If, as the court of appeals held, § 633a does not prohibit retaliation, then § 633a would not, for example, prevent an employer from adopting an overt policy of firing anyone who filed an age discrimination complaint. It is inconceivable that Congress intended to permit such an

evasion of § 633a. As the D.C. Circuit observed, "[i]t is difficult to imagine how a workplace could be 'free from *any* discrimination based on age' if, in response to an age discrimination claim, a federal employer could fire or take other action that was adverse to an employee." *Forman*, 271 F.3d at 297.

That Congress views a ban on retaliation as essential to its effort to eradicate invidious discrimination in all of its guises is confirmed by the fact that every major federal anti-discrimination statute prohibits retaliation. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); National Labor Relations Act, 29 U.S.C. § 158(a)(1); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3); Americans with Disabilities Act, 42 U.S.C. § 12203(a), (b); Family and Medical Leave Act, 29 U.S.C. § 2615(a); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140; Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311(b); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1).[4] There is no apparent reason why Congress would permit discriminatory retaliation in federal employment while banning it in every other context. Certainly, the court of appeals did not provide one.

Moreover, the Equal Employment Opportunity Commission ("EEOC")—the entity Congress expressly charged with enforcing § 633a[5]—has issued regulations confirming

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[4] Like § 633a(a), not all of these statutes contain a distinct retaliation provision. The federal-sector provision of Title VII, for example, does not specifically refer to retaliation. But courts have had no trouble concluding that Title VII's cause of action for discrimination against federal employees includes retaliation. *See Porter* v. *Adams*, 639 F.2d 273, 277-78 (5th Cir. 1981); *White* v. *GSA*, 652 F.2d 913, 917 (9th Cir. 1981) (same); *Canino* v. *United States EEOC*, 707 F.2d 468, 471-72 (11th Cir. 1983) (same).

[5] *See* 29 U.S.C. § 633a(b) (authorizing the EEOC "to enforce the provisions of subsection (a)" and granting EEOC authority to "issue such

that § 633a prohibits retaliation. The EEOC's regulations affirm that "[i]t is the policy of the Government of the United States to provide equal opportunity in employment for all persons" and "to prohibit discrimination in employment because of . . . age." 29 C.F.R. § 1614.101(a). They also mandate that "[n]o person shall be subject to retaliation for opposing any practice made unlawful by . . . the Age Discrimination in Employment Act." *Id.* § 1614.101(b) (citing as authority § 633a). The court of appeals did not even mention 29 C.F.R. § 1614.101.

Finally, the question presented in this case is important because of the inequitable disparities it creates within the federal employment sector. With more than 2.6 million employees (not including military personnel), the federal government is by far the nation's largest employer.[6] See U.S. Census Bureau, *Compendium of Public Employment: 2002*, at 12 tbl.9 (Sept. 2004). The rights and remedies afforded a federal employee faced with retaliatory age discrimination should not depend on where she happens to work. Accordingly, the Court should grant the petition to ensure that all federal employees enjoy the full measure of protection Congress granted them in § 633a, and to ensure that federal employees in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico possess the same rights and remedies as federal employees working in the nation's capital.

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rules, regulations, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section").

[6] By contrast, Wal-Mart, the nation's largest private employer, has 1.3 million employees in the United States. *See* Corporate Facts: Wal-Mart By the Numbers, *at* http://www.walmartfacts.com/FactSheets/3142007_Corporate_Facts.pdf (visited Mar. 29, 2007).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 06-1614

MYRNA GÓMEZ-PÉREZ,
Plaintiff, Appellant,

v.

JOHN E. POTTER, Postmaster General,
United States Postal Service,
Defendant, Appellee.

Heard Nov. 2, 2006
Decided Feb. 9, 2007

Before TORRUELLA, *Circuit Judge*, BALDOCK,* *Senior Circuit Judge*, and HOWARD, *Circuit Judge*.

TORRUELLA, *Circuit Judge*.

Myrna Gómez-Pérez ("Gómez") was a window distribution clerk for the United States Postal Service ("USPS"). Gómez alleges that she was subject to retaliatory treatment after filing an age discrimination complaint against her supervisors. She then filed suit against the USPS and John Potter ("Potter") in his capacity as Postmaster General, alleging, *inter alia*, violations of Section 15 of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 633a. The district court granted summary judgment to the USPS and Potter on Gómez's ADEA claim on the ground that the United States had not waived sovereign immunity as to retaliation claims under the ADEA. Gómez appeals from this

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* Of the Tenth Circuit, sitting by designation.

decision. After careful consideration, we conclude that the USPS and Potter have waived sovereign immunity with respect to ADEA suits, but that Section 15 of the ADEA does not provide a cause of action for retaliation by federal employers.

I. *Background*

We briefly recount the facts relevant to Gómez's claim. Gómez began working for the USPS in New York in 1987. In 1995, Gómez was transferred to the Caribbean District, and began working in Puerto Rico. Gómez was working at the Dorado Post Office in October 2002 as a full-time window distribution clerk when she requested a transfer to the Moca Post Office in order to be closer to her mother, who was ill. Gómez's supervisor approved the transfer, and Gómez began working at the Moca Post Office as a part-time window distribution clerk. Approximately one month later, in November 2002, Gómez requested a transfer back to the Dorado Post Office as a full-time window distribution clerk. On the same day, Gómez's supervisor converted the Dorado window distribution clerk position to a part-time position and filled it with another employee. Gómez's supervisor denied Gómez's transfer request.

After filing a grievance (which was denied), Gómez filed an equal employment opportunity complaint with the USPS, alleging that she had been discriminated against on the basis of her age. Gómez was forty-five years old at the time. After Gómez filed her complaint, she alleges that she was subject to various forms of retaliation. Gómez alleges that her supervisor called her to meetings during which groundless complaints were leveled against her. In addition, Gómez alleges that USPS posters related to sexual harassment were defaced and that her name was written on the posters. Gómez also alleges that her supervisors complained that she was sexually harassing her co-workers, when in fact she was not. Gómez states that her co-workers began to harass her and tell her to

"go back where you belong." Finally, Gómez states that her work hours were drastically reduced after she filed the complaint.

Gómez filed suit against the USPS and Potter (in his official capacity) in the United States District Court for the District of Puerto Rico on November 11, 2003, alleging, *inter alia*, that she had been retaliated against for filing her EEO Complaint, and that this retaliation constituted a violation of the ADEA, 29 U.S.C. § 633a. On July 7, 2005, the USPS and Potter filed a motion for summary judgment. The court referred the matter to a magistrate judge, and on January 30, 2006, the magistrate judge issued a report and recommendation that the motion for summary judgment be granted on the grounds that the United States had not waived sovereign immunity for retaliation suits under the ADEA. Gómez filed an objection to the report and recommendation, but the district court adopted it and granted summary judgment to the USPS and Potter on February 28, 2006. Gómez now appeals from the grant of summary judgment.

II. *Discussion*

We review a grant of summary judgment *de novo*, construing the evidence in the light most favorable to the nonmovants. *Iverson v. City of Boston*, 452 F.3d 94, 98 (1st Cir.2006). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

A. Sovereign Immunity

The United States is entitled to immunity from suit without its consent. *Muirhead v. Mecham*, 427 F.3d 14, 17 (1st Cir.2005); *see also United States v. Horn*, 29 F.3d 754, 761-62 (1st Cir.1994) (discussing the historical background of sovereign immunity). Although the USPS is independent from the executive branch, the Supreme Court has held that the Postal Service enjoys the federal government's immunity

from suit because of its significant government powers. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 126 S.Ct. 1252, 1255-56, 163 L.Ed.2d 1079 (2006). Potter, in his official capacity as Postmaster General, enjoys similar immunity. *See Loeffler v. Frank*, 486 U.S. 549, 562 n. 8, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988) ("Whenever the head of the Postal Service acts in his official capacity, he is acting in the name of the Postal Service. Thus, here . . . the acts of the named defendant are always chargeable as acts of the person or entity subject to the [waiver of immunity]."). Therefore, in order for Gómez to bring suit against the USPS and Potter, we need to find an "unequivocal" waiver of immunity that is expressed in "specific" statutory language. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980); *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). The Postal Reorganization Act, however, generally "waives the immunity of the Postal Service from suit by giving it the power 'to sue and be sued' in its official name." *U.S. Postal Serv. v. Flamingo Indus. Ltd.*, 540 U.S. 736, 744, 124 S.Ct. 1321, 158 L.Ed.2d 19 (2004) (quoting 39 U.S.C. § 401(1)). Accordingly, sovereign immunity does not present a bar to bringing an ADEA suit against the USPS or Potter.

B. Substantive Cause of Action

Our inquiry does not end here. As the Supreme Court stated in *Flamingo Industries*, once we have determined that sovereign immunity has been waived, we must proceed to determine whether "the substantive law in question is . . . intended to reach the federal entity." *Id.* Thus, we must determine whether Congress intended for the ADEA's prohibition on "discrimination based on age" to allow a plaintiff to bring a cause of action against the federal government for retaliation.

We begin with the plain text of § 633a; we "presume that a legislature says in a statute what it means and means in a

statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). Section 633a(a) states: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." The text of § 633a clearly prohibits discrimination against federal employees (over forty years old) based on age, but says nothing that indicates that Congress meant for this provision to provide a cause of action for retaliation for filing an age-discrimination related complaint. The question is, did Congress mean "discrimination *and retaliation*" when it said "discrimination"?

The difference between these two causes of action is clear, and was recently explained in the context of Title VII by the Supreme Court in *Burlington N. & Santa Fe Ry. v. White*:

> The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.

— U.S. —, 126 S.Ct. 2405, 2412, 165 L.Ed.2d 345 (2006) (internal citations omitted). The clear difference between a cause of action for discrimination and a cause of action for retaliation leads to the conclusion that if Congress had meant to provide for both causes of action, it would have said so explicitly in § 633a.

Gómez responds that, notwithstanding the differences between discrimination and retaliation, the Court also recently held in *Jackson v. Birmingham Bd. of Educ.*, that "when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of Title IX." 544 U.S. 167, 174, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) (emphasis omitted). Gómez argues that the logic the Court used in *Jackson* to find that a retaliation cause of action could be implied from a statute which prohibited only "discrimination" is equally applicable to the ADEA: retaliation is an intentional act, it is discriminatory in that it treats the complainant differently than others, and it is discrimination "based on" age because the nature of the complaint (for which the defendant is retaliating) is age discrimination. *Id.* at 173-74, 125 S.Ct. 1497.

We are not persuaded by this argument. First, we note that in *Jackson*, the Court was interpreting a judicially-created cause of action that was implied from Title IX of the Civil Rights Act of 1964. *Id.* at 173, 125 S.Ct. 1497 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 690-93, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)). The Court is the primary entity involved in "defin[ing] the contours of that right of action." *Jackson*, 544 U.S. at 173, 125 S.Ct. 1497. Here, we are constrained by the fact that Congress explicitly created a statutory cause of action in § 633a, but did not include retaliation in that cause of action. The Court specifically noted this difference in *Jackson* when rejecting comparisons between Title IX and Title VII. *Id.* at 175, 125 S.Ct. 1497 ("Title IX is a broadly written general prohibition on discrimination. . . . By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination."). In addition, the Supreme Court premised its holding in *Jackson* partially on the fact that Title IX prohibits discrimination in educational institutions, and that a retaliation cause of action would protect "teachers and coaches," who themselves were

not the targets of discrimination, but who "are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators." *Jackson*, 544 U.S. at 181, 125 S.Ct. 1497. Outside of the educational context, this is not necessarily true; employees such as Gómez can hardly argue that their co-workers are often in the best position to identify instances of age discrimination and bring it to the attention of supervisors. Finally, the Court stated in *Jackson* that Title IX was adopted in response to the Court's holding in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), in which the Court upheld a cause of action for retaliation for speaking out against race discrimination. *Jackson*, 544 U.S. at 179-80, 125 S.Ct. 1497. Here, there is no evidence in the legislative history that the ADEA's federal sector provisions were adopted in a similar context of claims by federal employees for retaliation for speaking out against age discrimination. *See, e.g.*, H.R. Rep. 93-913 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2811, 2850 (stating only that "[t]he committee expects that expanded coverage under the [ADEA] will remove discriminatory barriers against employment of older workers in government jobs"). Thus, neither the nature of the statute interpreted nor the policies discussed in *Jackson* justify extending its holding to the ADEA.

We also consider the legislative structure in determining congressional intent. *See Doe v. Boston Pub. Schs.*, 358 F.3d 20, 26 (1st Cir.2004). We begin by noting that 29 U.S.C. § 623(d), the parallel ADEA provision governing private employers, does provide an explicit cause of action for retaliation:

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a

> charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Chapter.

No equivalent provision exists for federal employees. We generally presume that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (internal citation and quotation marks omitted); *see also Nowd v. Rubin*, 76 F.3d 25, 27-28 (1st Cir.1996). The absence of statutory language providing a claim for retaliation in § 633a, when compared with the explicit prohibition on retaliation in § 623(d), further supports the conclusion that Congress intended for the ADEA to prohibit retaliation by private employers, but not by federal employers.

Gómez responds that the D.C. Circuit, in *Forman v. Small*, found that the difference between the private and public sector provisions was not dispositive.[1] 271 F.3d 285, 296 (D.C.Cir.2001) The D.C. Circuit suggested that it would be "difficult to imagine how a workplace could be 'free from any discrimination based on age' if, in response to an age discrimination claim, a federal employer could fire or take other action that was adverse to an employee." *Id.* at 297. As such, they concluded that "[n]othing in the plain language of § 633a suggests that Congress intended the federal workplace to be less free of age discrimination than the private workplace." *Id.*

We must respectfully disagree with our brethren on the D.C. Circuit. First, we note that the proper inquiry is not

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[1] The issue in *Forman* was not whether § 633a included a substantive cause of action for retaliation, but rather whether sovereign immunity had been waived. 271 F.3d at 296. However, as a precursor to finding a waiver of sovereign immunity in § 633a, the D.C. Circuit found that § 633a provided for a retaliation cause of action.

whether the statute shows that Congress intended to limit the scope of § 633a, but rather whether Congress intended to provide for a retaliation cause of action in § 633a in the first place. *See Iverson v. City of Boston*, 452 F.3d 94, 100 (1st Cir.2006) ("[A] private right of action may be conceived only by a statute that clearly evinces congressional intent to bestow such a right."). Furthermore, although *Forman* relied heavily on the Supreme Court's holding in *Lehman v. Nakshian*, 453 U.S. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981), *Lehman* expressly adopted the reasoning we apply here, that "Congress . . . demonstrated that it knew how to provide a statutory right . . . when it wished to do so elsewhere in the very 'legislation cited.'" *Id.* at 162, 101 S.Ct. 2698. Finally, we disagree with the D.C. Circuit's conclusion in *Forman* that the similarities between the provisions affecting federal employees in the ADEA and Title VII justify a finding that § 633a contains a retaliation provision. Although we acknowledge that § 633a is "patterned directly after § 717(a) and (b) of the Civil Rights Act of 1964," *Lehman*, 453 U.S. at 167 n. 15, 101 S.Ct. 2698, we see a significant difference between the two statutes. In Title VII, Congress intended for 42 U.S.C. § 2000e-16, the provision applicable to federal employees, to incorporate the provisions applicable to the private sector, including the private-sector anti-retaliation provision. *See, e.g., Ayon v. Sampson*, 547 F.2d 446, 450 (9th Cir.1976) ("[I]t is clear that Congress incorporated the [private-sector] protections against retaliation in its enactment of § 2000e-16."). In stark contrast, the provisions of the ADEA that apply to federal employees state that "[a]ny personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Chapter." 29 U.S.C. § 633a(f). The court in *Forman* stated that § 633a(f) presents "somewhat of a red herring." 271 F.3d at 298. However, we generally engage the presumption that statutes do not contain surplusage. *Arlington Cent. Sch. Dist. Bd. of Educ. v.*

Murphy, — U.S. —, 126 S.Ct. 2455, 2460, 165 L.Ed.2d 526 (2006). Here, it is quite easy to see why Congress might have included § 633a(f) in the ADEA: it did not want the expansive private-sector provisions of the ADEA extended to federal employees. *See, e.g., Lehman*, 453 U.S. at 162, 101 S.Ct. 2698 (finding that Congress did not intend for § 626(c), which provides for jury trials in private-sector age discrimination suits, to apply to federal employees); *id.* at 168, 101 S.Ct. 2698 ("[Section 633a(f)] clearly emphasized that [§ 633a] was self-contained and unaffected by other sections, including those governing procedures applicable in actions against private employers"); *Nowd*, 76 F.3d at 28 (deciding that § 626(b), which provides for the recovery of attorneys fees in private-sector age discrimination suits, does not apply to federal employees).

Accordingly, we decide that Congress did not intend for 29 U.S.C. § 633a to include a cause of action for retaliation as the result of having filed an age-discrimination related complaint. Because Gómez had no cause of action under § 633a for retaliation against the USPS or Potter, the district court properly dismissed her complaint.

III. *Conclusion*

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
D. PUERTO RICO

No. Civ. 03-2236(DRD)

MIRNA GOMEZ-PEREZ,

Plaintiff,

v.

JOHN E. POTTER, Postmaster General,
United States Postal Service,

Defendant.

Feb. 28, 2006

OPINION AND ORDER

DOMINGUEZ, J.

Pending before the Court is the defendant, John E. Potter Jr., in his official capacity as Post Master General of the United States of America or the "Postal Service" (USPS) *Motion for Summary Judgment* (Docket No. 43) moving the Court to dismiss plaintiff's claims for alleged age discrimination and retaliation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, and under the Age Discrimination in Employment Act (ADEA). The USPS sustain that there are no issues of material fact hence the Postal Service is entitled to judgment as a matter of law. On November 11, 2005, the instant motion for summary judgment and its related Opposition, Reply and Surreply were referred to Magistrate Judge Gustavo A. Gelpi for a Report and Recommendation (R & R)(Docket No. 62). On January 30, 2006, the Magistrate Judge entered its recommendation wherein it was recommended that the defendant's

motion for summary judgment be granted. (Docket No. 66). On January 31, 2006, plaintiff Mirna Gomez-Perez timely filed her objections to the Magistrate Judge's R & R (Docket No. 68). After considering plaintiff's objections, and reviewing *de novo* the R & R, for the reasons herein stated, the Court GRANTS USPS's *Motion for Summary Judgment* (Docket No. 43).

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The District Court may refer dispositive motions to a United States Magistrate Judge for a Report and Recommendation. 28 U.S.C. § 636(b)(1)(B) (1993); Fed.R.Civ. P. 72(b); Local Civil Rule 72(a), District of Puerto Rico. *See Mathews v. Weber*, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). Of course, an adversely affected party may contest the Magistrate's report and recommendation by filing its objections within ten (10) days after being served a copy thereof. *See*, Local Civil Rule 72(d); Fed.R.Civ. P. 72(b). Moreover, 28 U.S.C. § 636(b)(1), in pertinent part, provides that:

> Within ten days of being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

See 28 U.S.C. § 636(b)(1).

However, pursuant to Fed.R.Civ. P. 72(b), "[a]bsent objection by the plaintiffs, the district court had a right to assume that plaintiffs agreed to the magistrate's recommendation." *Templeman v. Chris Craft Corp.*, 770 F.2d 245,

247 (1st Cir.1985), *cert. denied*, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 556 (1985). Moreover, "[f]ailure to raise objections to the Report and Recommendation waives that party's right to review in the district court and those claims not preserved by such objection are precluded on appeal." *Davet v. Maccarone*, 973 F.2d 22, 30-31 (1st Cir.1992). *See also Henley Drilling Co. v. McGee*, 36 F.3d 143, 150-151 (1st Cir.1994) (holding that objections are required when challenging findings actually set out in magistrate's recommendation, as well as magistrate's failure to make additional findings); *Lewry v. Town of Standish*, 984 F.2d 25, 27 (1st Cir.1993) (stating that "[o]bjection to a magistrate's report preserves only those objections that are specified"); *Keating v. Secretary of H.H.S.*, 848 F.2d 271, 275 (1st Cir.1988); *Borden v. Secretary of H.H.S.*, 836 F.2d 4, 6 (1st Cir.1987) (holding that appellant was entitled to a de novo review, "however he was not entitled to a de novo review of an argument never raised"). *See generally United States v. Valencia*, 792 F.2d 4, 6 (1st Cir.1986); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir.1980).

Provided plaintiff, Mirna Gomez-Perez has objected to the determinations addressed by the Magistrate Judge, the Court shall make a *de novo* determination of the R & R.

MOTION FOR SUMMARY JUDGMENT

The standard for summary judgment has been revisited by the First Circuit Court of Appeals on several occasions. *Serapion v. Martinez*, 119 F.3d 982, 986 (1st Cir.1997), (*citing McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir.1995))(collecting cases); *Coyne v. Taber Partners I*, 53 F.3d 454, 457 (1st Cir.1995)(same). A court may grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

To determine whether these criteria have been met, a court must pierce the boilerplate of the pleadings and carefully review the parties' submissions to ascertain whether they reveal a trial worthy issue as to any material fact. *Perez v. Volvo Car Corporation*, 247 F.3d 303, 310 (1st Cir.2001); *Grant's Dairy-Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 14 (1st Cir.2000); *Cortes-Irizarry v. Corporation Insular*, 111 F.3d 184, 187 (1st Cir.1997). A fact is "material" if it potentially could affect the suit's outcome. *Id.* An issue concerning such a fact is "genuine" if a reasonable factfinder, examining the evidence and drawing all reasonable inferences helpful to the party resisting summary judgment, could resolve the dispute in that party's favor. *Id.* At the summary judgment stage, the trial court examines the entire record "in the light most flattering to the nonmovant and indulges all reasonable inferences in that party's favor. Only if the record, viewed in the manner and without regard to credibility determinations, reveals no genuine issue as to any material fact may the court enter summary judgment." *See Cadle Company v. Hayes*, 116 F.3d 957, 959-60 (1st Cir.1997).

The summary judgment machinery operates in two phases. First, the movant must make a preliminary showing that there is no genuine issue of material fact which requires resolution in the crucible of trial. Once this showing has been made, the burden shifts to the nonmovant to demonstrate, through specific facts, that a trialworthy issue remains. *Id.*

In applying the standard, the court must construe the record and all reasonable inferences from it in favor of the nonmovant (the party opposing the summary judgment motion). *Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49, 53 (1st Cir.2000); *Cortes-Irizarry*, 111 F.3d at 187; *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). An absence of evidence on a critical issue weighs against the party—be it the movant or the nonmovant—who

would bear the burden of proof on that issue at trial. *Perez*, 247 F.3d at 310; *see also Torres Vargas v. Santiago Cummings*, 149 F.3d 29, 35-36 (1st Cir.1998); *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir.1990). Defendants must not only show that there is "no genuine issue of fact," but also that they are "entitled to judgment as a matter of law." *Vega v. Rodriguez Puerto Rico Telephone Co.*, 110 F.3d 174, 178 (1st Cir.1997).

Fed.R.Civ.P. 56 does not ask which party's evidence is more plentiful, or better credentialed, or stronger weighted, because at the summary judgment stage, the Court may not weigh the evidence. *Cortez-Irizarry*, 111 F.3d at 187; *see also Casas Office Machines, Inc. v. Mita Copystar America, Inc.*, 42 F.3d 668 (1st Cir.1994). Summary judgment "admits no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails." *Id.* (*citing Greensburg v. Puerto Rico Maritime Shipping Authority*, 835 F.2d 932, 936 (1st Cir.1987)).

The Court must review the record "taken as a whole," and "may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000). This is so, because credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Id.* "The Court should give credence to the evidence favoring the nonmovant as well as the evidence supporting the moving party that is contradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.*

Similarly, unsettled issues of motive and intent as to the conduct of any party—as may arise in actions under §§ 1983 and 1985—will normally preclude the Court from granting summary judgment. *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670, 677 (1st Cir.1996) (reversing summary judgment and

emphasizing that "determinations of motive and intent . . . are questions better suited for the jury") (internal quotation marks omitted) (citation omitted); *see also Tew v. Chase Manhattan Bank, N.A.*, 728 F.Supp. 1551, 1555 (S.D.Fla.1990) ("Certain issues such as fraud, intent, and knowledge lend themselves to trial, rather than summary judgment. These matters can often only be proved by reliance upon circumstantial evidence except in the rare case where there is uncontroverted proof of a 'smoking gun.'"). However, "even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences [or] unsupported speculation." *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 95 (1st Cir.1996).

FACTUAL AND PROCEDURAL BACKGROUND

The facts to the instant case have been vastly discussed in the several motions and counter motions filed by both parties. However, none of the parties have opposed the factual background as set forth in the Magistrate Judge's R & R hence, the Court deems that the facts as stated in the R & R are uncontroverted facts for disposition at the summary judgment stage.[1]

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[1] The Court notes that plaintiff's *Objections to the Magistrate Judge's Report and Recommendation* (Docket No. 68) moves the Court to admit and add certain facts to the Magistrate Judge's R & R which were unchallenged and admitted by defendant hence could be crucial, should as plaintiff contends, sovereign immunity has been waived under § 633(a). Plaintiff avers that these facts must be included as uncontroverted facts should the Court reject the Magistrate Judge's recommendation to dismiss plaintiff's retaliation claims rather than addressing the merits of said claim. The facts to be added as requested by plaintiff are the following:

> 1) Shortly after plaintiff had filed an EEO complaint, plaintiff's supervisors, Rivera and Ciutron met at a quarterly management meeting. In said meeting Rivera informed Cintron that plaintiff had filed an EEO administrative complaint.

Plaintiff, Mirna Gomez-Perez is within the protected class for purposes of an ADEA claim. She began working with the USPS in New York on or about March 1987. After a reassignment to the Caribbean District, in or about July 1997, plaintiff was transfer [sic] to the Dorado station in a "mutual swap" of stations with a Dorado employee. Plaintiff then worked at the Dorado station from July 5, 1997 throughout November 2, 2002, occupying a full-time regular position as a Window Distribution Clerk under the supervision of Post Master Onell Rivera (Rivera).

Due to certain medical conditions suffered by plaintiff's mother, on or around October 24, 2002, plaintiff requested a transfer to a part-time flexible position as a Window Distribution Clerk at the Moca Post Office. However, Rivera attempting to convince plaintiff to remain at her post in the Dorado Post Office, advised plaintiff to reconsider the requested change as she was changing into a part-time flexible position which did not encompass a guaranteed forty hour work schedule and that the requested transfer was not temporary in nature. On November 2, 2002, plaintiff's transfer was approved and she began work in the Moca Post Office as a part-time Flexible Window Sales Associate. Plaintiff's supervisor was Post Master Jose Antonion Cintron, who was reassigned in January 2003 to the Sabana Grande Post Office but remained supervising the Moca Post Office

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2) Ramos, Cintron, Mr. Ruben Muñoz(shop steward), and Mr. Ricardo Morales were present during the March 5, 2003 meeting.

3) At the March 5, 2003 meeting, Cintron took notes and prepared a list of 8 accusations allegedly discussed with plaintiff that day in Cintron's office.

4) Only a few days had elapsed between the quarterly management meeting and the March 5, 2003 meeting.

5) After the March 5, 2003 meeting, Cintron ordered Mr. Hector Hermida not to assign plaintiff more than six hours of work each day.

until a new Post Master was hired. While being employed at the Moca station, on March 5, 2003, plaintiff was subjected to a pre-disciplinary talk by the plaintiff's area cluster leader Mr. Heriberto Ramos at Cintron's request. The meeting focused on complaints received by male co-workers stating that they felt sexually harassed by plaintiff's way of greeting male employees by a kiss in the cheek.

Parallel to the transfer request initiated by plaintiff, on October 30, 2002, another postal employee, Ivette Claudio requested to be reassigned from the Air Mail Facility to the Dorado Post Office. On November 6, 2002, Dorado's Post Master, Rivera, informed Ms. Ivette Claudio the availability of a part-time flexible position within the Dorado Post Office. Such part-time flexible position availability within the Dorado Post Office resulted from Rivera informing on November 22, 2002, the President of the Local Union the vacancy created by Gomez's transfer to the Moca station and Rivera's intention to revert Gomez's vacancy from a full-time position to a part-time flexible position. Further, Rivera informed the President of the Local Union the process to be followed in order to complete the reversion.

Notwithstanding plaintiff had been transferred to the Moca Post Office at her own request on November 2, 2002, shortly thereafter on November 27, 2002, Rivera confirmed by letter a previous telephone conversation he had with plaintiff requesting her to put into writing her request to return to the Dorado Post Office, the reasons for plaintiff's request and plaintiff's availability to work in a part-time position. In said letter, Rivera further informed plaintiff that there was a written commitment with another employee to fill the flexible part-time position and that said commitment was pending final approval by the District Office. On that same date, November 27, 2002, plaintiff filed a grievance procedure with the Union relating to the transfer request to the Dorado postal station. Said grievance procedure was ultimately denied.

On February 22, 2003, plaintiff filed an administrative procedure before the EEOC against the Postal Service alleging age discrimination, specifically against Rivera. In her EEOC charge, plaintiff alleged that Rivera took advantage of the opportunity to get rid of her because she was not able to work with packages, and that plaintiff believed that because Claudio was younger than plaintiff, Rivera rather wanted her as an employee.

On November 18, 2003, plaintiff filed the instant case against her employer, the USPS, alleging age discrimination and retaliation pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000 *et seq.*, and presumably under ADEA. Plaintiff alleges that: 1) she was discriminated because of her age; 2) that her position was granted to an employee younger in age and with less experience than plaintiff; and 3) that age was the determinative factor at the time her request to be rehired at her formal workplace was denied and in the transfer of a younger, and with less working experience postal employee to plaintiff's former position. Further, plaintiff avers that after filing an EEOC administrative charge, the USPS in retaliation thereof denied her request to be transferred to her prior workplace, reduced her working shift, and subjected her to humiliation.

Defendant's motion for summary judgment sustains that plaintiff's claims should be dismissed inasmuch plaintiff has failed to establish a *prima facie* case of age discrimination and retaliation consequently, it is unable to support the discrimination claims alleged in the complaint. Plaintiff countered focusing mainly in its retaliation claim and failing to address the arguments relating to the age discrimination claim. The defendant Replied [sic] to plaintiff's opposition and raised new arguments of law centered in the position that the Government has not waived its sovereign immunity to be sued under ADEA for retaliatory [sic] hence plaintiff's retaliation claims should be dismissed. Plaintiff surreplied

alleging precisely the contrary, to wit, that the Government has waived its immunity. The Court notes that both parties have submitted jurisprudence from other sister courts. However, in the realm of the First Circuit, the issue constitutes a matter of first impression.

APPLICABLE LAW AND LEGAL ANALYSIS

I. ADEA CLAIMS

At the outset, the Court notes that plaintiff has not objected the conclusion reached by the Magistrate Judge in its R & R as to plaintiff not developing an argument opposing the defendant's request to dismiss plaintiff's ADEA claims. Furthermore, the Magistrate Judge recommended that plaintiff's ADEA claims should be dismissed because, in its opinion, plaintiff had failed to establish a *prima facie* case.

Notwithstanding, the Court notes that plaintiff's objection states that ". . . it does not object to all the Magistrate Judge's conclusion with respect to what is labeled as 'Age Discrimination Claims' under Section B, since a reading of Plaintiff's motions in opposition to summary judgment show that plaintiff had waived other claims of discrimination under ADEA, effectively reducing her case to a discrimination on age based entirely on retaliatory types of discrimination". (Docket No. 68, Objections to the Magistrate Judge's Report and Recommendation, P.1-2). The Court deems that plaintiff has expressly abandoned its non-retaliatory substantive ADEA claims and has acquiesced to the Magistrate Judge's recommendation to grant the Government's request for dismissal. Therefore, the Court does not have to conduct a review under the plain error standard because plaintiff has *de facto* withdrawn its ADEA claims. Consequently, the Magistrate Judge's Report and Recommendation is ADOPTED and plaintiff's ADEA claims against the defendant is hereby DISMISSED WITH PREJUDICE.

II. ADEA RETALIATION CLAIMS

The Magistrate Judge's R & R concluded that plaintiff's retaliation claims under ADEA should be dismissed because, as stated previously, the United States has not waived its sovereign immunity thus, retaliation claims under ADEA are not actionable under § 633(a). The Magistrate Judge clearly stated the well established rule within the federal jurisprudence that the United States may not be sued unless a specific federal statute expressly authorizes the suit. The Magistrate Judge specifically noted that ADEA, when invoked in the private employment sector, prohibits retaliation against employees complaining of discrimination under ADEA § 623(d). However, the Magistrate Judge noted that the language of the federal counterpart does not allow retaliation claims under ADEA § 633a(a).

Plaintiff's timely objected the conclusions reached by the Magistrate Judge and reiterated its argument under the waiver of immunity doctrine as set forth in *Forman v. Snell*, 271 F.3d 285 (D.C.Cir.2001), *cert. denied*, 536 U.S. 958, 122 S.Ct. 2661, 153 L.Ed.2d 836 (2002). Specifically, plaintiff objects to the Magistrate Judge labeling the *Forman* opinion as a "perceived breadth" analysis and sustains that the *Forman* Court concluded that under § 633(a) the waiver of sovereign immunity is expressed rather than implied. Further, plaintiff sustains that the reasoning set forth in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) is fully applicable to the instant case, but it was not brought to the attention of the Magistrate Judge because the case, unbeknownst to counsel, dealt with other anti-discrimination statute [sic]. Moreover, plaintiff sustains that *Jackson's*, definition of "discrimination" controls the instant controversy and supports the view of the *Forman* court inasmuch the plain meaning of "discrimination" in both cases is identical. Counsel for plaintiff affirms that under the *Jackson* court analysis, a statute does not have to contain the express use of

the word "retaliation" in order to encompass a prohibition of retaliation.[2]

It is settled law within the federal jurisprudence that the standard to determine whether sovereign immunity has been waived is demanding. *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999)(*citing Lane v. Pena,* 518 U.S. 187, 192-193, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996)). Further, waivers are to be narrowly construed in favor of the sovereign and the ambiguities are to be construed against waiver. *Orff v. United States*, 545 U.S. 596, 125 S.Ct. 2606, 2610, 162 L.Ed.2d 544 (2005); *United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995). Accordingly, a waiver of federal sovereign immunity must be unequivocally expressed in the statutory text. *Lane v. Pena*, 518 U.S. at 192. In summary, the general principle is that the United States cannot be held as having entered consent to be sued without an express and unequivocal statutory waiver. As stated by the Supreme Court, "[t]he corollary to this settled principle is that a waiver of sovereign immunity may not be implied; nor can '[a] statute's legislative history . . . supply a waiver that does not appear clearly in any statutory text'". *Lane v. Pena*, 518 U.S. at 192.

The Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful for an employer, including a State, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age". 29 U.S.C. § 623(a)(1). It was not until 1974 when § 633a was put into effect, that ADEA coverage was extended to federal employees creating an

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[2] *Jackson's* discrimination and retaliation analysis was performed within personal causes of action filed pursuant to Title IX. The *Jackson* court determined that retaliation is a form of discrimination because the complainant has been subjected to differential treatment resulting from the initial complaint.

exclusive remedy for age discrimination in federal employment. *Christie v. Marston*, 451 F.Supp. 1142 (N.D.Ill. 1978).[3] Consequently, the federal government has consented to be sued in federal court for such actions arising from discriminatory acts against federal employees because of the employee's age.

Further, an ADEA retaliation claim does not have as a prerequisite that plaintiff previously prevailed in the underlying substantive ADEA claim. *Ingels v. Thiokol Corp.*, 42 F.3d 616 (10th Cir.1994). Notwithstanding, the issue of law before the Court is to determine whether a plaintiff may file a retaliation claim because of discriminatory conduct resulting from its age under § 633a(a). In other words, does the language within § 633a(a) include, impliedly or expressly, a waiver to sovereign immunity thus, the federal government may be sued for retaliation claims under ADEA. The matter has not been entertained in our Circuit Court of Appeals.

At the outset, the Court notes that § 633a(f) provides that "[a]ny personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section". As stated by the Magistrate Judge this is "an exclusivity clause that limits application of any

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[3] In its relevant parts, § 633a(a) provides that: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments, . . . in executive agencies . . . , in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units in the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age".

further provision of the chapter to the section affecting federal employers". Hence, the discrimination form of retaliation contained within the applicable statutory scheme for the private sector in § 623(d) does not apply to federal employees because § 633a(f) excludes the application of any other section within ADEA, and because under ADEA's § 623(d), the federal government is excluded from the definition of employer.[4]

Plaintiff avers that the doctrine expressed in *Forman v. Small*, constitutes a cogent well expressed argument finding a waiver for retaliation claims under ADEA against a federal employer contained at § 633a(a). The *Forman* court concluded that the broad, sweeping and plain language within § 633a(a), referring to "any discrimination" based on age, advances the purpose of the statute to the effect that a "work place cannot be free from any age discrimination if an employer can take an adverse employment action against its employees because the employee has brought an age discrimination claim against the employer". *Forman v. Small*, 271 F.3d at 298-299. The Court reasoned that ADEA statutory differences amongst the federal and private sectors were not dispositive of the issues as determined by other sister courts because although § 633a(f) precludes adoption of other sections within ADEA to federal employment, the statute's unqualified language encompasses a claim for retaliation because "analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor". *Forman v. Small*, 271 F.3d at 297(citations omitted). The Court proceeded to conclude that the language of § 633a cannot be read to suggest "that Congress intended the federal workplace to

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[4] In its relevant parts, § 623(d) provides that: "[i]t shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has made a charge, . . . or participated in any manner in an investigation, proceeding, or litigation under the [ADEA].

be less free of age discrimination than the private sector" because otherwise "absurd results" would follow.

Performing an examination of § 633a(a)'s legislative history, the *Forman* Court noted that Congress' intent when enacting the statute was "to remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as [ADEA] has and continues to do in private employment". *Forman v. Small*, 271 F.3d at 297(citations omitted). Further, as to the exclusivity language contained within § 633a(f), the *Forman* court determined that said language does not preclude a determination that the waiver was expressly contained within the statute, as opposed to § 623(d) wherein a retaliation cause of action is contained *ad verbatim*, because it was not borrowing provisions from elsewhere in the ADEA statutory framework. Rather, the court relied on the broad language of § 633a(a) interpreting that there cannot be a work place free from age discrimination if the employer is free to adverse employment action against the employee because the employee had initiated a claim against its employer for age discrimination, said action being precluded under § 633a(a).

To reach its ultimate conclusion, the *Forman* court examined previous Fifth Circuit jurisprudence comparing by analogy the language contained within § 633a(a) and 42 U.S.C. § 2000e-16 wherein Congress waived sovereign immunity for Title VII claims to include a claim for retaliation. The relevant jurisprudence examined by the *Forman* court compared § 2000e-16's language with that of 42 U.S.C. §§ 2000e-3 and 2000e-4, and determined that the latter was narrowly drawn and prohibited certain types of discrimination while § 2000e-16's language was drafted broadly enough to prohibit any type of discrimination, to wit, those considered

in §§ 2000e-3 and 2000e-4, and any other as well.[5] Then, the *Forman* court examined the language of § 633a(a) and § 2000e-16 and concluded that both statutes were drafted using identical language creating a cause of action for federal employees under ADEA and Title VII. Consequently, these statutes should be interpreted consistently.

Finally, the *Forman* court ignored other sister court's reasoning as to the exclusivity provision contained in § 633a(f). The court concluded, as stated previously, that the broad and sweeping language within § 633a(f) allowed any type of

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[5] In its relevant parts, 42 U.S.C. § 2000e-16 provides:

> Discriminatory practices prohibited; employees or applicants for employment subject to coverage
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> All personnel actions affecting employees or applicants for employment . . . in military departments, . . . in executive agencies . . . , in the United States Postal Service and the Postal Rate Commission, in those units in the Government of the District of Columbia having positions in the competitive service, and in those units in the judiciai branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

In turn, 42 U.S.C. § 2000e-3 reads as follow [sic]:

> Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

discriminatory conduct, including retaliation, because its legislative history did not suggest a limitation as to the broad scope of coverage of § 633a as originally intended, and secondly, because it was not borrowing other provisions within ADEA.[6]

The Government's argument before the Magistrate Judge sustains the thesis that the language contained in § 633a(a) does not amount to a waiver of immunity. The Government relied in [sic] jurisprudence from other sister courts, to wit, *Cyr*[7] and *Mineta*[8]. The *Cyr* court examined the *Forman* and the *Bornholdt* rulings and deemed the rulings as unpersuasive because an analysis based on the perceived breadth of the statute was contrary to the Supreme Court's requirement that a waiver of immunity be expressed in unequivocal statutory language. The *Cyr* Court determined that the sister courts' reasoning in *Forman* failed inasmuch the statutory language provided by Congress within § 633a(a) failed to provide a retaliation cause of action nor expressly and unequivocally provided a waiver of sovereign immunity. Finally, the *Cyr* court concluded that it is not "proper to infer a waiver based on the breadth of the statutory language or speculations about congressional intent [because] such inferences and speculations have no place in federal sovereign immunity law". *Cyr v. Perry*, 301 F.Supp.2d at 534 (*citing Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996); *Research Triangle Inst. v. Bd. of Governors of the Federal Reserve Sys.*, 132 F.3d 985, 987 (4th Cir.1997)).

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[6] The D.C. Circuit Court noted that in *Bornholdt v. Brady*, 869 F.2d 57, 63 (2nd Cir.1989) *in dictum* the Second Circuit observed that the government waived sovereign immunity for ADEA retaliation claims.

[7] *Cyr v. Perry*, 301 F.Supp.2d 520 (E.D. Virginia 2004).

[8] *Whitman v. Mineta*, 382 F.Supp.2d 1130 (D.Alaska 2005).

Distinguishing the conclusion reached in *Forman*, the *Cyr* Court reasoned that "there is no reasonable grounds to conclude that 'retaliation' is a form of 'discrimination based on age' because, as noted, retaliation is a different claim with different elements and can be established without a showing of age animus". *Cyr v. Perry*, 301 F.Supp.2d at 532. Furthermore, after examining regulations containing express language providing a cause of action for retaliation under ADEA claims expressly waiving the sovereign immunity, the *Cyr* Court restated the well established principle that federal regulations cannot supply a waiver rather, the waiver must be found explicitly and unequivocally in the statute. *Cyr v. Perry*, 301 F.Supp.2d at 532-534.

Finally, the *Cyr* court determined that the Government has not waived its immunity for retaliation claims under ADEA by means of merely comparing said statute with waiver of immunity under Title VII claims pursuant to 42 U.S.C. § 2000e-16, prohibiting discrimination by federal employer. The Court reasoned that § 2000e-16 allowed incorporating language from other provisions of the statute that expressly and unequivocally prohibited retaliation however, said course of action is precluded by the exclusivity clause at § 633a(f).

Similarly, in *Whitman v. Mineta*, the Court examined other sister courts' decisions addressing whether ADEA's language contains a waiver of immunity. As to the *Forman* court's ruling, *Whitman* concluded that the analysis performed in the former inferred an implied immunity waiver since the language lacked an express waiver. *Whitman v. Mineta*, 382 F.Supp.2d at 1134. The *Mineta* court joined the analysis performed in *Cyr* concluding that the breadth of § 633a(a) does not necessarily indicate an intent to encompass retaliation since the claim and burden of proof of an ADEA cause of action is different from those of a retaliation claim. *Whitman v. Mineta*, 382 F.Supp.2d at 1135.

Furthermore, in *Mineta* the court reasoned that to determine whether the language of the statute contains evidence of an immunity waiver being in effect, the language, purpose and history of the statute must be examined. Having examined the statutory language and reaching identical conclusion [sic] as in *Cyr,* the *Mineta* court proceeded to examine the second and third sources of potential evidence of waiver. As to the purpose of the ADEA, *Mineta* determined that it is three-folded, to wit, to promote employment of older persons based on their agility rather than age; to prohibit arbitrary age discrimination in employment; and to help to promote ways of solving problems arising from the impact of age on employment. *Mineta*, 382 F.Supp.2d at 1135. The court reasoned that since the statute's purpose lacked any reference to include protection from employer retaliation, the intent to include reprisal protection was obviated. Likewise, examining the history of the statute, the court concluded that there was lack of persuasive evidence of a waiver because at the time § 633a(a) was enacted the applicable provisions to the private sector were already in place, and Congress openly avoided extending its application to federal employment. Hence there is an express exclusion of a statutory disposition previously expressly included by Congress applicable to the private industry. Finally, *Mineta* also determined that the language of the exclusivity provision in § 633a(f) evidences that no other provision within ADEA could logically be invoked against a federal employer specifically, the provision relating to the express prohibition of retaliation in the private sector pursuant to § 623(d).

Having expressed the legal background, and pursuant to the relevant Supreme Court and the First Circuit jurisprudence, the Court must determine whether § 633a(a)'s language contains an implied or express waiver of immunity. Addressing firstly, the language typically used for express waivers as compared to the language provided in § 623(d) it is evident that no express waiver is provided for retaliation

claims within federal employment. As to whether an implied waiver does in fact exists [sic], as stated previously, the controversy is an issue of first impression within the First Circuit's district courts.

The Court is conscious of the well settled principle that waiver of the Federal Government's sovereign immunity must be unequivocally expressed in the statute and will not be implied. *Lane v. Pena*, 518 U.S. at 192 (citations omitted). Likewise, a waiver of immunity shall be strictly construed, in terms of its scope, and further instances of ambiguity must be decided in favor of the sovereign immunity. *United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995); *Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). Similarly, when the Government consents to be sued, the limitations and conditions of said consent must be strictly observed and exceptions are not to be implied. *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). Furthermore, the Supreme Court has also ruled that a statute's legislative history cannot provide the unequivocal waiver that must clearly appear in the statutory text. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). Therefore, in order to sustain that the Government has consented to be sued for retaliation under ADEA, the waiver of immunity must extend unambiguously to such retaliation claims.

In the First Circuit the doctrine of sovereign immunity has been narrowly constructed as well. For instance, it has been clearly established that ADEA plaintiffs under § 633a are not entitled to jury trials as their private sector counterparts. *Nowd v. Rubin*, 76 F.3d 25, 27 (1st Cir.1996)(*citing Lehman v. Nakshian*, 453 U.S. 156, 160-161, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). Likewise, the First Circuit has refused to grant attorneys fees under § 633a(c) allowing such equitable remedies that will effectuate the purposes of ADEA because

the Act failed to make express reference to award attorney's fees against the United States contrary to its private sector counterpart incorporating explicit incorporation under the Fair Labor Standards Act § 216(b). *Nowd v. Rubin*, 76 F.3d at 27.

Thus, the undersigned is bound to comply with the applicable jurisprudence of the appellate court and conclude that unless there is express language providing a waiver of sovereign immunity, the United States cannot be sued for retaliation claims under ADEA's § 633a(a). Further, the Court notes that the First Circuit court has acknowledge [sic] that under § 633a there is no prerequisite to exhaust administrative procedures before initiating a suit in federal court contrary to claims under Title VII and claims pursuant to 42 U.S.C. § 2000e-16. *Lavery v. Marsh*, 918 F.2d 1022, 1025 n. 4 (1st Cir.1990).[9] Consequently, plaintiff's analogy with 42 U.S.C. § 2000e-16 fails.

Finally, plaintiff's recognize that in the arguments previously presented before the Magistrate Judge they failed to incorporate discussion relating *Jackson v. Birmingham Bd. of Education*. Notwithstanding, plaintiff move [sic] the Court to consider said arguments in their objections to the R & R. However, it is known that arguments not raised before a Magistrate Judge are deemed waived and the party failing to

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[9] The Court notes that in *Lavery* the appellate court borrowed Title VII's statute of limitations to bring forth a claim under ADEA § 633a because the statute itself was silent as to the proper statute of limitations for such claims. However, one matter is to borrow a statute of limitations, and the other is to waive sovereign immunity in absence of express language and in presence of a self-contained scheme defining the remedial limits of federal government liability under the ADEA. After all, "the waivers of sovereign immunity are to be strictly construed in favor of the United States and 'must not be enlarged beyond such boundaries as [the statute's] language plainly requires". *Nowd v. Rubin*, 76 F.3d at 27 (*citing United States v. Horn*, 29 F.3d 754, 762 (1st Cir.1994))(emphasis added).

raise such issue is not entitled to a *de novo* review. *Borden v. Secretary of H.H.S.*, 836 F.2d at 6(holding that appellant was entitled to a de novo review, "however he was not entitled to a de novo review of an argument never raised"). *See generally United States v. Valencia*, 792 F.2d 4, 6 (1st Cir.1986); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir.1980). It is known that a party must take before the Magistrate Judge "not only their 'best shot' but all of their shots". *Singh v. Superintending School Committee*, 593 F.Supp. 1315, 1318 (D.Me.1984). Consequently, plaintiff's request that this Court consider *Jackson* fails.

CONCLUSIONS

For the reasons stated herein, the Court ADOPTS *in toto* the Magistrate Judge's Report and Recommendation (Docket No. 66) GRANTS USPS's *Motion for Summary Judgment* (Docket No. 43) and hereby DISMISSES plaintiff's ADEA claims and plaintiff's retaliation claims under ADEA against all defendants WITH PREJUDICE. Judgment shall be entered.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-1614

MYRNA GOMEZ-PEREZ,
Plaintiff-Appellant,

v.

JOHN E. POTTER, Postmaster General,
United States Postal Service,
Defendant-Appellee.

Before

Boudin, *Chief Judge,*
Torruella, Baldock, Lynch,
Lipez and Howard,
Circuit Judges.

ORDER OF COURT

Entered: March 20, 2007

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied.*

By the Court:

MARGARET CARTER
Chief Deputy Clerk

APPENDIX D

STATUTE

29 U.S.C. § 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will

effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

FILED
JUL 24 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1321

In the Supreme Court of the United States

MYRNA GOMEZ-PEREZ, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the federal sector prohibition against discrimination based on age in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a (Supp. IV 2004), creates a cause of action that permits an employee to sue a federal employer for alleged retaliation.

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In the Supreme Court of the United States

No. 06-1321

MYRNA GOMEZ-PEREZ, PETITIONER

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JOHN E. POTTER, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 476 F.3d 54. The opinion and order of the district court (Pet. App. 11a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2007. A petition for rehearing was denied on March 20, 2007 (Pet. App. 33a). The petition for a writ of certiorari was filed on March 30, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, provides that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age" in speci-

fied federal departments and agencies, including the United States Postal Service, "shall be made free from any discrimination based on age." 29 U.S.C. 633a(a) (Supp. IV 2004). Any person aggrieved by such discrimination "may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 633a(c). With one exception not relevant here, personnel actions taken by federal departments and agencies covered by the ADEA are not "subject to" any other provision of the ADEA. 29 U.S.C. 633a(f).

b. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, provides that it is unlawful to

> take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—
>
> > (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
> >
> > (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A).

5 U.S.C. 2302(b)(9).

Many employees of the United States Postal Service (USPS) are excepted from the CSRA and are instead covered by collective bargaining agreements or a personnel system developed by the USPS. See 39 U.S.C. 410(a), 1001, 1206(b) (authorizing collective bargaining), 1209(a). In authorizing those alternative personnel systems, Congress required the USPS to "assure its officers and employees * * * full protection of their employment rights by guaranteeing them an opportunity

for a fair hearing on adverse actions." 39 U.S.C. 1001(b).

The USPS personnel system prohibits "any action, event, or course of conduct that * * * subjects any person to reprisal for prior involvement in EEO activity." USPS, *Employee and Labor Relations Manual* § 665.23, at 688 (Feb. 15, 2007) (*ELM*) <http://www.usps.com/cpim/manuals/elm/elm.htm>. All collective bargaining agreements incorporate that prohibition against retaliation. They also prohibit discipline that is "punitive" and not "for just cause."[1]

2. Petitioner was a window distribution clerk for the USPS. Pet. App. 1a. In November 2002, petitioner requested a transfer from a position at the Moca, Puerto Rico Post Office to a position at the Dorado, Puerto Rico Post Office. *Id.* at 2a. Petitioner's supervisor denied that request. *Ibid.* Petitioner filed an equal employment opportunity complaint with the USPS, alleging that she had been discriminated against on the basis of age. *Ibid.* Petitioner alleges that, after she filed that complaint, she was subjected to various forms of retaliation. *Ibid.*

In November 2003, petitioner filed suit in the United States District Court for the District of Puerto Rico, against the USPS, alleging, *inter alia*, that she had been subjected to retaliation for filing an age discrimination complaint and that this retaliation constitutes a violation

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[1] *Agreement Between the USPS and the National Postal Mail Handlers Union* arts. 16, 19 (2000) < http://www.npmhu.org/Resource/Agreement/USPSNPMHU2000NationalAgreement.pdf>; see USPS & American Postal Workers Union, *National Collective Bargaining Agreement* arts. II, XVI (July 20, 1971) <http://www.apwu.org/dept/ind-rel/sc/oldcbas/APWU%20Contract%201971-1973.pdf> (termination only "for just cause").

of the ADEA. Pet. App. 3a. The district court granted summary judgment to the government on petitioner's retaliation claim, holding that the United States had not waived its immunity from suit for retaliation claims. *Id.* at 21a-32a. The court reasoned that waivers of immunity must be express, and that the federal sector age discrimination prohibition does not contain an express waiver of immunity for retaliation claims. *Id.* at 29a-31a.

3. The court of appeals affirmed. Pet. App. 1a-10a. The court held that sovereign immunity does not preclude an ADEA suit against the USPS because the Postal Reorganization Act, 39 U.S.C. 101 *et seq.*, waived the USPS's sovereign immunity. Pet. App. at 4a. The court further held that the ADEA does not "allow a plaintiff to bring a cause of action against the federal government for retaliation." *Ibid.* The Court reasoned that the "text of § 633a clearly prohibits discrimination against federal employees (over forty years old) based on age, but says nothing that indicates that Congress meant for this provision to provide a cause of action for retaliation for filing an age-discrimination related complaint." *Id.* at 5a.

The court noted that this Court in *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405, 2412 (2006), had explained that the substantive prohibition against discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, seeks to prohibit injury to individuals based on their status, whereas Title VII's anti-retaliation provision seeks to prevent harm to individuals based on their conduct. Pet. App. 5a. The court concluded that this "clear difference between a cause of action for discrimination and a cause of action for retaliation leads to the conclusion that if Congress

had meant to provide for both causes of action, it would have said so explicitly." *Ibid.*

The court of appeals rejected on several grounds petitioner's reliance on the holding in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), that the implied right of action in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, for discrimination based on sex encompasses protection against retaliation. Pet. App. 6a-7a. First, the court noted that *Jackson* was "interpreting a judicially-created cause of action," giving the Court authority to define "the contours of that right of action." *Id.* at 6a (citation omitted). Second, the court observed that the *Jackson* Court had premised its holding in part on its conclusion that a retaliation remedy was necessary to further the statute's objectives because coaches and teachers, although not themselves the targets of sex discrimination, were often in the best position to identify such discrimination against students. *Id.* at 6a-7a. Third, the court noted that Title IX was enacted against the backdrop of *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which had held that a statute barring discrimination based on race gave rise to a implied right of action to sue for retaliation. Pet. App. 7a. The court concluded that none of those rationales applies in the present context. *Id.* at 6a-7a.

In concluding that the ADEA federal sector prohibition does not encompass retaliation, the court of appeals also relied on the structure of the ADEA. In particular, the court noted that the ADEA provision governing private employers expressly provides a cause of action for retaliation, making the absence of such a parallel provision in the federal sector significant. Pet. App. 7a-8a. Moreover, the court noted, the federal sector ADEA

provision specifies that federal employers shall *not* be subject to the provisions that govern private employers. *Id.* at 9a (citing 29 U.S.C. 633a(f)).

The court of appeals noted that the D.C. Circuit had held in *Forman* v. *Small*, 271 F.3d 285 (2001), cert. denied, 536 U.S. 958 (2002), that the ADEA federal sector provision creates a cause of action for retaliation. Pet. App. 8a-9a. For the reasons discussed above, however, the court disagreed with the D.C. Circuit's conclusion. *Id.* at 8a-10a.

ARGUMENT

The court of appeals correctly held that the ADEA provision applicable to federal employers does not create a retaliation remedy, and that holding does not conflict with any decision of this Court. The decision below conflicts with the D.C. Circuit's decision in *Foreman*. Because those are the only two circuits that have addressed the issue, however, further ventilation of the issue may be appropriate and could eliminate the need for the Court's intervention to resolve the issue. Moreover, review is particularly unwarranted in the context of this case because, regardless of the scope of the ADEA, most USPS employees, including petitioner, are protected against retaliation under the terms of collective bargaining agreements. The petition for a writ of certiorari should therefore be denied.

1. The federal sector ADEA provision prohibits "discrimination *based on age*." 29 U.S.C. 633a(a) (Supp. IV 2004) (emphasis added). When viewed in the context of the ADEA as a whole, the term "based on age" limits the reach of the federal sector ADEA prohibition to discrimination based on the individual victim's age; it does

not cover retaliation against a person who has filed an age discrimination complaint.

A comparison between the ADEA's provisions governing private employers and the provision governing federal employers is particularly revealing. The provisions governing private employers separately prohibit *both* discrimination because of an individual's age, 29 U.S.C. 623(a)(1), and discrimination because an individual has filed an age discrimination complaint, 29 U.S.C. 623(d), while the ADEA provision governing federal employers prohibits *only* discrimination based on age. 29 U.S.C. 633a(a) (Supp. IV 2004). Equally important, the provision applicable to federal employers specifies that none of the provisions governing private employers shall apply to federal employers. 29 U.S.C. 633a(f). The overwhelming implication from that series of provisions is that while the ADEA's private sector provisions prohibit both discrimination based on a victim's age and retaliation based on a person's conduct in filing an age discrimination complaint, the federal sector provision reaches only discrimination based on the individual victim's age. See Pet. App. 9a-10a.

It is also significant that the federal sector provision constitutes a waiver of the United States' immunity from suit. It is an accepted principle of statutory construction that waivers of the United States' immunity from suit "must be construed strictly in favor of the sovereign." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (citation and internal quotation marks omitted). That principle of strict construction leads to the conclusion that the federal sector ADEA provision prohibits only discrimination based on the individual victim's age, not

retaliation against a person for filing an age discrimination complaint.[2]

That understanding of the ADEA's federal sector prohibition is also consistent with the Court decision in *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). In that case, the Court held that the provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, barring discrimination by private employers because of, *inter alia*, race or sex is "not coterminous" with a Title VII provision barring discrimination by private employers because a person has filed a Title VII complaint. *Burlington*, 126 S. Ct. at 2414. The Court explained that "[t]he substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* at 2412.

That analysis is equally applicable here. The federal sector prohibition against discrimination "based on age" seeks to prevent injury to individuals based on their status as persons who are more than 40 years of age; it does not seek to prevent harm to individuals based on their conduct in filing an age discrimination complaint.

That reading of the federal sector prohibition against discrimination based on age does not leave persons

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[2] As the court of appeals noted (Pet. App. 4a), the Postal Reorganization Act generally waives the USPS's immunity from suit. For most federal employers, however, the ADEA constitutes the sole waiver of immunity from ADEA claims. Because the ADEA cannot be interpreted one way for federal agencies and departments for which it constitutes the only waiver, and a different way for agencies for which Congress has generally waived immunity from suit, the principle that waivers of sovereign immunity must be strictly construed is applicable here. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005).

who complain of age discrimination without protection against retaliation. The CSRA makes it a prohibited personnel practice to "take or fail to take, or threaten to take or fail to take, any personnel action" because an employee has "exercise[d] * * * any appeal, complaint or grievance right granted by any law, rule, or regulation" or "testif[ied] for or otherwise lawfully assist[ed] any individual in the exercise of any [such] right." 5 U.S.C. 2302(b)(9). A federal employee claiming retaliation that results in removal, suspension of more than 14 days, or reduction in grade or pay may seek relief from the Merit Systems Protection Board (MSPB) with review by the Federal Circuit. 5 U.S.C. 7512, 7701-7703. An employee complaining of retaliation of a less serious nature may bring a complaint to the Office of Special Counsel, which is authorized to seek corrective action on the employee's behalf before the MSPB. 5 U.S.C. 1212.

The CSRA excludes many USPS employees from its protections. But those employees are protected against retaliation by USPS regulations and collective bargaining agreements. The Postal Service *ELM* prohibits "any action, event, or course of conduct that * * * subjects any person to reprisal for prior involvement in EEO activity." *ELM* § 665.23, at 688. That prohibition applies to employees who work under a collective bargaining agreement as well as those who do not. See, *e.g.*, *Agreement Between the USPS and the National Postal Mail Handlers Union* art. 19 (2000) (Mail Handlers Agreement) <http://www.npmhu.org/Resource/Agreement/USPSNPMHU2000NationalAgreement.pdf>; *Harrell* v. *USPS*, 445 F.3d 913, 922-923 (7th Cir), cert. denied, 127 S. Ct. 845 (2006). Employees who work under a collective bargaining agreement also are protected from discipline that is not "for just cause," and retaliation

for filing an ADEA claim would not constitute just cause. See Mail Handlers Agreement art. 16; USPS & American Postal Workers Union, *National Collective Bargaining Agreement* art. XVI (July 20, 1971) <http://www.apwu.org/dept/ind-rel/sc/oldcbas/APWU%20Contract%201971-1973.pdf>.

2. Petitioner errs in contending (Pet. 7-8) that the decision of the court below conflicts with this Court's decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005). In *Jackson*, the Court addressed the scope of the implied right of action in Title IX, which provides that "[n]o person * * * shall, on the basis of sex, * * * be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). The Court in *Jackson* held that retaliation against a person because that person has complained of sex discrimination gives rise to a private right of action under that provision. 544 U.S. at 173-174.

Petitioner seeks to extrapolate from *Jackson* the rule that any prohibition against discrimination based on a particular characteristic necessarily carries with it a prohibition against retaliation against a person who complains of that form of discrimination, regardless of the statutory scheme at issue. Pet. 8. *Jackson*, however, established no such sweeping principle. To the contrary, *Jackson* noted that Title VII's prohibition against discrimination by private employers based on race and sex does not encompass protection against retaliation, 544 U.S. at 175, a point this Court reaffirmed in *Burlington*. See 126 S. Ct. at 2412, 2414.

Moreover, rather than relying on statutory language in isolation, the Court in *Jackson* rested its decision on several key contextual factors, including that (1) Title

IX, in contrast to Title VII, creates an implied rather than an express cause of action, 544 U.S. at 175, (2) Title IX was enacted against the backdrop of the Court's holding in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), that a similar statute created an implied right of action for retaliation, *Jackson*, 544 U.S. at 176, and (3) Title IX's statutory purposes cannot be achieved without protection against retaliation. *Id.* at 180.

None of those factors is present here. First, the ADEA creates an express cause of action, not an implied right of action. Second, because *Sullivan*, like *Jackson*, interpreted the scope of an implied right of action, it cannot be presumed that Congress was seeking to incorporate *Sullivan*'s holding when it enacted the ADEA's express cause of action five years later. And third, because the CSRA, federal regulations, and collective bargaining agreements furnish protection against retaliation, an ADEA retaliation remedy is not needed to accomplish the ADEA's purposes.

Even more important, the provision at issue here is informed by at least two contextual factors that were not present in *Jackson*. As discussed above, the structure of the ADEA as a whole (especially its different treatment of private and federal employers) and the principle that waivers of sovereign immunity must be strictly construed lead to the conclusion that the provision at issue here does not afford protection against retaliation. Because the context of the provision at issue here differs so fundamentally from the context of the provision at issue in *Jackson*, petitioner's reliance on that decision is misplaced.

3. As petitioner notes (Pet. 7), the decision below conflicts with the D.C. Circuit's decision in *Forman* v. *Small*, 271 F.3d 285 (2001), cert. denied, 536 U.S. 958

(2002). Review of that conflict is not warranted at this time.

At present, there is only a one-to-one circuit split on the question presented, and that issue may benefit from further ventilation in the circuits. There will be ample opportunity for such ventilation in the near future because cases raising the issue are pending in at least two additional circuits. See *Whitman* v. *Mineta*, No. 05-36231 (9th Cir. filed Dec. 30, 2005); *Kuzdrowski* v. *Nicholson*, No. 06-4894 (3d Cir. Nov. 29, 2006); *Stremple* v. *Secretary Dep't of Veterans Affairs*, No. 06-3807 (3d Cir. filed Aug. 23, 2006).

Moreover, should those circuits agree with the court below, the conflict may ultimately resolve itself without the need for the Court's intervention. If three circuits should agree with the government's position in this case, the D.C. Circuit may well be willing to revisit its decision in *Forman*. That is particularly true because the D.C. Circuit decided *Forman* without the benefit of briefing on "whether § 633a prohibits retaliation." 271 F.3d at 295.

Furthermore, the *Forman* decision is premised in part on the court's view that, if there were no ADEA retaliation remedy, a federal employer could fire an employee who complained of age discrimination. 271 F.3d at 297. In the court's view, failing to recognize a retaliation remedy would therefore "produce absurd results." *Ibid.* As discussed above, however, independent of the ADEA, federal law prohibits federal employers from engaging in such retaliation. The D.C. Circuit's error on that component of its analysis provides yet another reason to conclude that the D.C. Circuit might be willing to revisit its decision in *Foreman*.

Finally, *Forman* was decided before this Court's decision in *Burlington*, a case on which the court below heavily relied. See Pet. App. 5a. It was also decided before this Court's decision in *Jackson*, a case on which petitioner primarily relies. Review of the question presented should await a conflict in circuit court decisions that take those two decisions into account.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2007

Supreme Court, U.S.
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No. 06-1321

IN THE

Supreme Court of the United States

MYRNA GOMEZ-PEREZ

Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The ruling below cannot be reconciled with the decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), and creates a square conflict in the circuits on an important and recurring question of federal law. The government essentially argues that this conflict should be allowed to fester because the First Circuit's interpretation of § 633a of the Age Discrimination in Employment Act ("ADEA") is so plainly correct that other circuits will adopt it, and the D.C. Circuit will, in turn, likely revisit and abandon its decision in *Forman* v. *Small*, 271 F.3d 285 (D.C. Cir. 2001). This prediction of a "self-healing" circuit conflict is utterly baseless.

The government identifies no flaws in *Forman*'s analysis of § 633a that would lead the D.C. Circuit to repudiate that decision. *Forman* did not ignore the ADEA's separate ban on reprisals by private employers, but instead recognized that § 623's fundamentally different structure provided no basis for narrowing § 633a's sweeping terms. The D.C. Circuit recently re-affirmed this reasoning, see *Rochon* v. *Gonzales*, 438 F.3d 1211, 1215 (D.C. Cir. 2006), and *Jackson* ratified it. Similarly, *Forman*'s conclusion that § 633a's ban was sufficiently clear to waive sovereign immunity for retaliation claims was ratified by *Jackson*'s construction of virtually identical language in Title IX, which was also subject to a "clear statement" rule. In claiming that the D.C. Circuit erred by failing to consider import of the Civil Service Reform Act ("CSRA"), the government ignores that Act's express proviso that its remedies cannot narrow § 633a. And the government ignores the Equal Employment Opportunity Commission regulations that bolster the D.C. Circuit's ruling.

The First Circuit's contrary interpretation of § 633a is not only wrong, it flouts the reasoning and holding of *Jackson*. No "contextual factors" can mask or excuse such disregard of this Court's precedent, which separately justifies review. Nor will this Court's consideration of the issue benefit from

further ventilation. The two conflicting decisions canvass the competing interpretive arguments that can be drawn from the ADEA's language, structure and history, from analogous provisions and from this Court's decisions. The government identifies no new evidence or arguments under consideration in the other cases it cites; indeed, those cases simply underscore that the issue is a frequently recurring one.

Finally, the suggestion that victims of retaliation will suffer no harm if the Court waits to hear from other circuits is false: the alternative remedies the government cites are inferior and in some cases wholly illusory. Delaying resolution of the clear conflict creates an unfair and untenable regime in which employees of the very same federal agency have different protections against reprisals for age discrimination complaints depending upon whether they work in Boston or Washington, D.C. Brief of *Amicus Curiae* AARP ("AARP Br.") at 3. The importance of uniform protections for millions of federal workers plainly outweighs the government's inchoate concern over whether the conflict is sufficiently mature.

1. Most of the government's opposition is devoted to arguing that § 633a does not prohibit reprisals against federal workers who complain of age discrimination. In light of the D.C. Circuit's contrary conclusion, these merits arguments militate in *favor* of review. Given the acknowledged conflict, there is no reason to await rulings by other courts: on the government's view, the circuit encompassing perhaps the largest number of the nation's 2.6 million federal workers has misread a statute governing its relationship with its workers.

The crux of the government's opposition, therefore, is that "the conflict may ultimately resolve itself without the need for the Court's intervention," because the First Circuit's interpretation is so plainly correct that other circuits are likely to adopt it, which will prompt the D.C. Circuit to "revisit its decision in *Forman*." Opp. at 12; see also *id.* at 6. This daisy-chain reasoning is wholly without merit. In making it, the government simply repeats the First Circuit's reasoning,

without even addressing the many flaws petitioner identified in the decision below.

The government claims that § 623 of the ADEA creates an "overwhelming implication" that § 633a does not permit retaliation claims because § 623 separately prohibits discrimination based on a charge of age discrimination, while § 633a does not. *Id.* at 7. But, as the D.C. Circuit explained, this comparison ignores the fundamental differences between the provisions. Section 633a is a broadly-worded, stand-alone ban, whereas § 623 "is narrowly drawn and sets forth specific prohibited forms of age discrimination in private employment." *Forman*, 271 F.3d at 296. The fact that Congress included retaliation in a list of discrete types of unlawful private-sector conduct does not demonstrate that discriminatory reprisals fall outside the scope of § 633a's sweeping requirement that "*[a]ll*" federal personnel actions "be made free of *any*" age discrimination, 29 U.S.C. § 633a(a) (emphases added). Indeed, the government's apples-to-oranges comparison creates the absurd implication that § 633a's sweeping terms do not bar age discriminatory job notices, because § 623(e) includes an express prohibition on such notices, while § 633a does not. See Pet. at 16 n.3.

Forman's refusal to draw a negative inference based on a comparison of fundamentally different prohibitions is not only correct, it was ratified in *Jackson*. This Court explained that Congress's decision to prohibit retaliation in the private employer provisions of Title VII provided no basis for concluding that Title IX failed to prohibit retaliation, because Title VII's private employer provisions "spell[] out in greater detail the conduct that constitutes discrimination in violation of that statute," whereas Title IX "is a broadly written general prohibition on discrimination." *Jackson*, 544 U.S. at 175. The Court thus rejected the very reasoning the government employs to defend the decision below.

The government also argues, Opp. at 7, that its interpretation is buttressed by § 633a(f), which provides that

the ADEA's private sector provisions do not apply to federal employers. See 29 U.S.C. § 633a(f). As the D.C. Circuit explained, however, this argument is "a red herring." *Forman*, 271 F.3d at 298. A determination that § 633a(a) prohibits retaliation does "not incorporate the provisions of § 623(d) into § 633a"; it simply enforces the broad prohibition found in the plain language of § 633a itself. *Id.*

Nor does the fact that § 633a is a waiver of sovereign immunity justify narrowing its plain language. The D.C. Circuit recognized that such waivers are strictly construed and cannot be implied. *Id.* at 296. It found that § 633a's "sweeping" and "unqualified" language waived immunity for retaliation claims "because analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor." *Id.* (internal quotation marks citation omitted).

Jackson also ratified this eminently correct reasoning. The Court held that "retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." 544 U.S. at 174. The Court concluded, moreover, that the clarity of this prohibition—which is in all relevant respects identical to the prohibition in § 633a—was sufficient to satisfy a "clear statement" rule no less stringent than that governing waivers of sovereign immunity. See *id.* at 184 (Thomas, J., dissenting) (noting that Congress must "speak unambiguously in imposing conditions on funding recipients through its spending power"); *id.* at 183 (concluding that retaliation "violates 'the *clear terms of the statute*'") (emphasis added).

Remarkably, while it claims that *Forman* could soon be reconsidered, the government does not even mention, let alone challenge, *Forman*'s structural analysis of § 633a and § 623, its treatment of § 633a(f) or its sovereign immunity analysis. Instead, the government cites as "error" the D.C. Circuit's supposed failure to recognize that a narrow construction § 633a would not leave persons who complain of age discrimination unprotected from reprisals, because the

CSRA provides remedies for such conduct. Opp. at 9, 12. But the CSRA forecloses this argument. It expressly provides that it "shall not be construed to extinguish or lessen . . . any right or remedy available to any employee or applicant for employment in the civil service under . . . sections [631] and [633a] of the [ADEA]." 5 U.S.C. § 2302(d). Thus, Congress determined that the CSRA—which provides no right to judicial redress and only limited administrative remedies, see *infra*—was not an adequate substitute for the ADEA.[1]

Finally, *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006), casts no doubt on *Forman*'s reasoning, and provides no basis for its reconsideration. *Burlington* analyzed the wording of the private employer provisions of Title VII to determine if its proscription on retaliation reached employer actions outside the workplace. As part of this analysis, the Court observed that § 703(a) "seeks to prevent injury to individuals based who they are, *i.e.*, their status," while the anti-retaliation provision "seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* at 2412. Read in context, this statement simply notes that the different wording of these two provisions dictated correspondingly different purposes, and that the latter's objective of preventing employer interference with enforcement efforts would not be achieved if an employer could retaliate outside the workplace. *Id.* That observation was plainly not a repudiation of *Jackson*'s holding—issued only a year earlier—that reprisals against those who complain of unlawful discrimination is, analytically, a species of "discrimination" against the protected class.

In short, there is no merit to the government's suggestion that the split in the circuits will resolve itself. The D.C. Circuit only recently re-affirmed "the cogency of th[e]

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[1] It follows *a fortiori* that if the CSRA itself should not limit any rights or remedies under § 633a, agency regulations or bargaining agreements likewise provide no basis for limiting those rights and remedies.

reasoning" in *Forman*. See *Rochon*, 438 F.3d at 1215 (discussing *Forman*'s reliance on *Porter* v. *Adams*, 639 F.3d 273 (5th Cir. 1981)). *Jackson* ratified *Forman*'s interpretation of statutory text materially indistinguishable from Title IX, as well as the reasoning *Forman* used to analyze fundamentally different statutory prohibitions. Nothing in the CSRA or the *Burlington* decision casts any doubt on *Forman*'s holding or reasoning. And, in regulations entitled to *Chevron*-style deference, Pet. at 18-19 n.5, the EEOC has concluded that the ADEA's ban on age discrimination does encompass reprisals. Because the government has failed to identify any reason why the D.C. Circuit would revisit its careful, exhaustive and correct decision in *Forman*, the circuit split will not be resolved without this Court's intervention.

2. Review is also warranted because the First Circuit's interpretation of § 633a conflicts directly with this Court's interpretation of Title IX's essentially identical language in *Jackson*. *Id.* at 7-13. Unable to refute this showing, the government mischaracterizes it, claiming petitioner "seeks to extrapolate from *Jackson* the rule that *any* prohibition against discrimination based on a particular characteristic necessarily carries with it a prohibition against retaliation against a person who complains of that form of discrimination, *regardless of the statutory scheme at issue*." Opp. at 10 (emphases added). But the decision below conflicts with *Jackson* not because § 633a and Title IX both prohibit discrimination *vel non*, but because they do so in *virtually identical terms*. Indeed, the government does not, because it cannot, identify any difference between a provision that bars "discrimination based on" a protected status and one that proscribes "discrimination" "on the basis of" a protected status. Because this Court concluded that Title IX, by its plain terms, prohibits retaliation, it follows as a matter of course, not unreasonable extrapolation, that the materially identical language of § 633a also prohibits retaliation. Yet the First Circuit reached the opposite conclusion.

No "contextual factors," *id.* at 10-11, justify this failure to follow *Jackson*'s interpretation of a materially identical prohibition. The fact that Title IX's cause of action was implied, while § 633a creates an express cause of action, is utterly irrelevant. The government nowhere disputes that the substantive rights enforced in an implied cause of action are defined by the statutory text from which the right of action is implied, just as rights enforced through an express cause of action are defined by the statute that confers the right of action. Thus, any determination of the scope of Title IX's *substantive prohibition* depends "on the text of Title IX." 544 U.S. at 173; see *id.* at 175 ("Courts must accord Title IX a sweep as broad as its *language*") (emphasis added; internal quotation marks omitted). The scope of § 633a's prohibition also depends on its text. As that text is materially indistingushable from Title IX's, § 633a must likewise create a substantive ban on retaliation.

Similarly, there is no basis to the claim that, while it is reasonable to presume that the 1972 Congress that enacted Title IX knew of the decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), it is unreasonable to presume such knowledge by the 1974 Congress that enacted § 633a, because *Sullivan* involved an implied right of action. Opp. at 11. Contrary to the government's claim, *Sullivan* did not interpret "the scope of an implied right of action," *id.*, but rather "a general prohibition on racial discrimination" in the *text* of 42 U.S.C. § 1982. *Jackson*, 544 U.S. 176. In *Jackson*, this Court presumed that the 1972 Congress was aware of this ruling when it used the words "discrimination" "on the basis of sex" in Title IX. It is equally reasonable to presume that Congress was aware of this ruling when it used the materially identical phrase "discrimination based on age" in § 633a just two years later. The presumption, in other words, concerns how Congress expected this Court to interpret a substantive prohibition; the manner in which that prohibition is judicially enforced (*i.e.*, through an implied or express cause of action)

has no bearing on whether Congress expected the word "discrimination" to be construed to encompass retaliation.

The government's remaining "contextual factors," Opp. at 11, are equally irrelevant. The CSRA provides that its remedies cannot limit the scope of § 633a. Congress's view that other *statutory* remedies are no substitute for the ADEA's protections forecloses any claim that agency regulations or collective bargaining agreements can limit § 633a's scope. Similarly, as the D.C. Circuit has cogently explained, the structure of the ADEA as a whole, and its different provisions for private and federal employers, provide no basis for giving § 633a a narrower scope than the materially identical language of Title IX. And, Title IX's language was subject to a clear statement rule no less stringent than that governing waivers of sovereign immunity.

In sum, the conflict between the First Circuit's construction of § 633a and *Jackson*'s interpretation of a virtually identical prohibition cannot be explained away. This conflict provides a further reason for review of the decision below.

3. Finally, further ventilation of the issue is neither necessary nor appropriate. There is no reason to allow other circuits to ignore or flout *Jackson*'s directly applicable textual analysis and reasoning. And, for the reasons discussed above, any suggestion that future circuit decisions will lead the D.C. Circuit to reconsider *Forman* is fanciful.[2]

Nor will future decisions shed new light on the meaning of § 633a. While the government disparages the adequacy of the advocacy in *Forman*, *id.* at 12, the decision itself thoroughly and carefully canvassed the arguments from the text, structure and history of the statute, as well as those that could be drawn

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[2] In fact, other circuits have expressed their agreement with the result in *Forman* and/or have employed similar reasoning in concluding that Title VII's highly analoguous ban on public employer discrimination encompasses retaliation. *See* Pet. at 13 n.1; *id.* at 18 n.4; AARP Br. at 7-8.

from analogous provisions and this Court's decisions. Aware of the D.C. Circuit's contrary ruling, the First Circuit also undertook a thorough examination of these same materials. Moreover, the government is the litigant in the pending cases it cites and, if the Court grants review, can be expected to identify all arguments for why it believes the D.C. Circuit's interpretation is erroneous. The government nowhere suggests that courts are currently considering any new arguments or evidence that were not considered in *Forman* or the decision below. The cases the government cites simply confirm that the proper interpretation of § 633a is a recurring question requiring this Court's attention.

Contrary to the government's claims, moreover, postponing resolution of this issue will significantly and unfairly prejudice petitioner and other federal workers. As the government concedes, many postal workers are not even covered by the CSRA. Its suggestion that these workers are protected by USPS regulations instead, *id.* at 9, is highly misleading. The government cites a USPS prohibition on reprisals, *id.* (quoting USPS, *Employee and Labor Relations Manual* § 665.23, at 688 (Feb. 15, 2007) ("*ELM*") *available at* http://www.usps.com/cpim/manuals/elm/elm.htm), but this prohibition is grounded in the ADEA, *ELM* § 672.1(d), and the remedy for its violation is the right to file a complaint with the EEOC, and/or a civil action under the ADEA. *Id.* § 666.22; USPS, Pub. 133, *What You Need to Know About EEO* 19 (May 2003), *available at* http://www.usps.com/cpim/ftp/pubs/pub133.pdf. Under the decision below, this "remedy" is a dead end: such a suit must be dismissed for want of a cause of action.

Nor has the government demonstrated that, where applicable, the CSRA or the collective bargaining agreements it cites provide the same scope of relief available under the ADEA. The CSRA provides no judicial remedy. *Schrachta* v. *Curtis*, 752 F.2d 1257, 1259 (7th Cir. 1985) (per curiam) (collecting cases). Instead, persons aggrieved by retaliatory

suspensions or removals of more than 14 days, or reductions in grade or pay, may seek relief from the Merit Systems Protection Board ("MSPB"), which *cannot* grant compensatory damages for age-based claims. *Currier* v. *USPS*, 72 M.S.P.R. 191, 195-96 & n.5 (M.S.P.B. 1996); see also *Bohac* v. *Dep't of Agric.*, 239 F.3d 1334, 1342-43 (Fed. Cir. 2001) (authority to grant "corrective action" does not allow recovery of such non-"out of pocket" damages as emotional suffering or reputational harm). Persons who, like petitioner, suffer retaliation in the form of a hostile work environment, are not even afforded this remedy; they can only complain to the Office of Special Counsel, which may bring a claim before the MSPB. See Opp. at 9. It is presumably because the CSRA's remedies are not coterminus with the protections afforded by § 633a that Congress expressly provided that those remedies do not limit the scope of § 633a.

Delaying resolution of the clear conflict, therefore, will force federal workers around the country to litigate for rights that workers in the nation's capital possess. And it creates an unfair and untenable regime in which employees of the same federal agency, such as the Justice Department, have different rights and remedies depending upon whether they work in Boston or Washington, D.C. AARP Br. at 3. Indeed, employees can gain or lose such rights simply by being transferred between offices. The importance of uniform protections for millions of federal workers more than justifies the far from unusual step of reviewing a 1-to-1 circuit split. See, *e.g.*, *Hincks* v. *United States*, 127 S. Ct. 2011, 2015 (2007) (granting review of such a split); *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763, 1767 (2007); *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 (2005).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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No. 06-1321

IN THE
Supreme Court of the United States

MYRNA GÓMEZ-PEREZ,

Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 06-1321 Petition For A Writ Of Certiorari at the following pages.

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UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO (SAN JUAN)

3:03-cv-02236-DRD-GAG

GÓMEZ-PÉREZ,

Plaintiff,

v.

POTTER,

Defendant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
11/18/2003	1	COMPLAINT Filing Fee $ 150 Receipt # 140881 (np) (Entered: 12/01/2003)
12/30/2003		SUMMONS issued for John E. Potter, US Postal Service, Atty Gen, US Atty. Follow up by 3/29/04 . (np) (Entered: 12/31/2003)
01/13/2004	2	SUMMONS Returned Executed as to John E. Potter, US Postal Service by certified mail, US Atty thru M. Ferrer on 1/13/04. Answer due on 3/15/04 for US Postal Service, for John E. Potter (np) (Entered: 01/15/2004)
03/08/2004	3	First MOTION for Extension of Time to File Answer *to Complaint* filed by Ginette L. Milanes on behalf of all defendants Suggestions in opposition/ response due by 3/22/2004 (Milanes, Ginette) (Entered: 03/08/2004)

DATE	NO.	PROCEEDINGS
03/11/2004	4	ORDER granting 3 Motion for Extension of Time to Answer the complaint. Answer deadline due by 4/12/2004. Signed by Judge Clerk on 3/11/04. (np,) Modified on 4/16/2004 (np,). DOCKETED IN ERROR. (Entered: 03/11/2004)
04/05/2004	5	*Defendant's* ANSWER to Complaint filed by Ginette L. Milanes on behalf of Defendant John E. Potter.(Milanes, Ginette) (Entered: 04/05/2004)
06/08/2004	6	ORDER SETTING INITIAL SCHEDULING AND CASE MANAGEMENT CONFERENCE, Set Scheduling Order Deadlines; Memorandum Filing due by 7/22/2004. Initial Scheduling Conference set for 8/5/2004 08:45 AM in DRD's Chambers before Daniel R Dominguez. Signed by Judge Daniel R Dominguez on 06/08/2004. (om,) (Entered: 06/08/2004)
07/22/2004	7	CASE MANAGEMENT MEMORANDUM by John E. Potter. (Milanes, Ginette) (Entered: 07/22/2004)
07/22/2004	8	NOTICE of Appearance by Edelmiro Antonio Salas-Gonzalez by on behalf of Myrna Gomez-Perez (Salas-Gonzalez, Edelmiro) (Entered: 07/22/2004)
07/22/2004	9	CASE MANAGEMENT MEMORANDUM by Myrna Gomez-Perez. (Salas-Gonzalez, Edelmiro) (Entered: 07/22/2004)

DATE	NO.	PROCEEDINGS
08/06/2004	10	MOTION to Substitute *SAUSA Ginette L. Milanes* Attorney Isabel Munoz-Acosta filed by Isabel Munoz-Acosta on behalf of John E. Potter, United States Postal Service (Munoz-Acosta, Isabel) (Entered: 08/06/2004)
08/06/2004	11	NOTICE *to the Court Regarding Re-Service of Documents* by John E. Potter, United States Postal Service (Munoz-Acosta, Isabel) (Entered: 08/06/2004)
08/07/2004	12	Minute Entry for proceedings held before Judge Daniel R Dominguez : Minute of Proceedings held on 08-05-04. (jf,) (Entered: 08/07/2004)
08/07/2004	13	ORDER granting 10 Motion to Substitute Attorney. Attorney Ginette L. Milanes terminated AUSA Isabel Munoz is entered as counsel for the Government. Signed by Judge Daniel R Dominguez on 08/07/04. (jf,) (Entered: 08/07/2004)
08/07/2004		Set Deadlines/Hearings: Initial Conference set for 9/24/2004 08:45 AM in DRD's Chambers before Daniel R Dominguez. (jf,) (Entered: 08/07/2004)
09/01/2004	14	INFORMATIVE Motion filed by Edelmiro Antonio Salas-Gonzalez on behalf of Myrna Gomez-Perez (Salas-Gonzalez, Edelmiro) (Entered: 09/01/2004)

DATE	NO.	PROCEEDINGS
09/24/2004	15	ORDER. Plaintiffs Informative Motion as to the service of defendants with Plaintiffs Answers to Interrogatories, documents requested and compliance with request for admissions (Docket No. 14) is hereby NOTED . Signed by Judge Daniel R Dominguez on 09-24-04. (lt) (Entered: 09/24/2004)
11/08/2004	16	NOTICE of Appearance by Katherine Gonzalez-Valentin by on behalf of all defendants (Gonzalez-Valentin, Katherine) (Entered: 11/08/2004)
11/12/2004	17	MOTION requesting Order *Under Privacy Act* filed by Edelmiro Antonio Salas-Gonzalez on behalf of Myrna Gomez-Perez (Salas-Gonzalez, Edelmiro) (Entered: 11/12/2004)
11/18/2004	18	MOTION for extension of time until 2/18/2005 discovery deadline to 4/22/05 diapositive motion deadline filed by Katherine Gonzalez-Valentin on behalf of John E. Potter, United States Postal Service Suggestions in opposition/response due by 12/1/2004 (Gonzalez-Valentin, Katherine) (Entered: 11/18/2004)
12/19/2004	19	ORDER DENYING 17 Motion requesting Order. At the Initial Case Management and Scheduling Conference held on September 24, 2004, the Court reminded the parties that no discovery related motions were to be

DATE	NO.	PROCEEDINGS

filed with the Court except by prior exhaustion of Local Rule 26 (b). Specifically, the parties were advised that if no agreement was reached after conducting a Local Rule 26(b) meeting, only then, the parties were to reach the law clerk assigned to this case via telephone and inform the matter in controversy. Then the parties would submit their respective positions as to the matter via fax and the judge would try to reach the parties within forty-eight (48) hours of their call to resolve the matter (the parties may request a transcript and the judge will issue a Minute of Proceedings as to the issue, the position of the parties and the resolution of the matter). Finally, if the parties' telephone call was not answered by the judge within five (5) days after the call, only then, will the parties be authorized to file a discovery-related motion with the Court.

Nevertheless, if the Court deemed appropriate that to solve the matter it needs to hold a hearing, said hearing will be scheduled promptly thereafter. The instant motion has failed to show that the procedure advised to the parties has been properly exhausted therefore, the instant motion is DENIED. Signed by Judge Daniel R

DATE	NO.	PROCEEDINGS
		Dominguez on 12/19/04. (jf,) (Entered: 12/19/2004)
12/21/2004	20	MOTION for Reconsideration & *Seeking Relief from Order* re [19] Order on Motion requesting Order,,,,, filed by Edelmiro Antonio Salas-Gonzalez on behalf of Myrna Gomez-Perez Suggestions in opposition/response due by 1/3/2005 (Related document(s)[19]) (Salas-Gonzalez, Edelmiro) (Entered: 12/21/2004)
01/19/2005	21	*** FILED IN ERROR - One Party Missing *** Joint MOTION for Protective Order filed byKatherine Gonzalez-Valentin on behalf of all defendants Suggestions in opposition/ response due by 2/1/2005 (Attachments: # 1)(Gonzalez-Valentin, Katherine) Modified on 1/19/2005 (ov,). (Entered: 01/19/2005)
01/19/2005	22	Joint MOTION for Protective Order filed byKatherine Gonzalez-Valentin on behalf of all parties Suggestions in opposition/response due by 2/1/2005 (Attachments: # 1)(Gonzalez-Valentin, Katherine) (Entered: 01/19/2005)
01/20/2005	23	MOTION to Withdraw Motion re:20 MOTION for Reconsideration & *Seeking Relief from Order* re [19] Order on Motion requesting Order,,,,, filed byEdelmiro Antonio Salas-Gonzalez on behalf of Myrna Gomez-Perez (Re-

DATE	NO.	PROCEEDINGS
		lated document(s)20) (Salas-Gonzalez, Edelmiro) (Entered: 01/20/2005)
01/31/2005	24	Minute Entry for proceedings held before Judge Daniel R Dominguez : ISC called oon [sic] 9/24/04. Discovery deadline for 11/19/04 limited to liability issues. Dispositive mots deadline for 12/17/04, oppositions 30 days thereafter. (jf,) Modified on 2/8/2005 adding text (np,). (Entered: 01/31/2005)
01/31/2005	25	ORDER withdrawing 20 Motion for Reconsideration, terminating 21 Motion for Protective Order, granting 23 Motion to Withdraw. See joint motion for the issuance of protective order at Docket No. 22 . Signed by Judge Daniel R Dominguez on 01/31/05. (jf,) (Entered: 01/31/2005)
02/09/2005	26	ORDER granting/moot 18 Motion for extension of time. The discovery cutoff date is reset for February 28, 2005 and the Dispositive Motions Deadline is reset for the 1st day of April 2005. The parties are advised that NO FURTHER EXTENSIONS OF TIME SHALL BE GRANTED. The Court grants the joint request Motion for the Issuance of Protective order at Docket No. 22. The Court shall issue a Separate Order.. Signed by Judge Daniel R Dominguez on 02/09/05. (jf,) (Entered: 02/09/2005)

DATE	NO.	PROCEEDINGS
02/09/2005	27	PROTECTIVE ORDER pursuant to Joint Motion for The Issuance of Protective Order at Docket No. 22. Signed by Judge Daniel R Dominguez on 02/09/05. (jf,) (Entered: 02/09/2005)
02/23/2005	28	ORDER: The Court hereby ORDERS counsel to appear at a Status Conference set for the 3rd day of March 2005 at 5:30 p.m. The Court shall address Rule 26 issues. IT IS SO ORDERED. NO CONTINUANCES SHALL BE GRANTED. Signed by Judge Daniel R Dominguez on 02/23/05. (jf,) (Entered: 02/23/2005)
02/25/2005	29	MOTION to Continue *Status Conference* filed byKatherine Gonzalez-Valentin on behalf of all defendants (Gonzalez-Valentin, Katherine) (Entered: 02/25/2005)
03/01/2005	30	ORDER granting as requested 29 Motion to Continue . The Court grants the continuance of the Status Conference. The Status Conference is rescheduled for the 16th day of March 2005 at 5:30 p.m. As per the motion filed by the parties this is an available date for both counsel. ABSLOLUTELY NO FURTHER CONTINUANCES SHALL BE GRANTED. Further, the dispositive motion deadline is set for the 18th day of April 2005. THIS IS FIRM A DATE AND NO EXTENSIONS OF TIME SHALL

DATE	NO.	PROCEEDINGS
		NOT BE GRANTED. ANY MOTION REQUESTING AN EXTENSION OF TIME OR A CONTINUANCE SHALL BE SUMMARILY DENIED. Signed by Judge Daniel R Dominguez on 02/28/05. (jf,) (Entered: 03/01/2005)
03/16/2005	31	ORDER : The Status Conference scheduled for March 16, 2005 is hereby CONTINUED for the 23rd day of March 2005 at 5:00 p.m. The Dispositive Motion Deadline shall be reset at said conference. IT IS SO ORDERED.. Signed by Judge Daniel R Dominguez on 03/16/05. (jf,) (Entered: 03/16/2005)
03/23/2005	50	Minute Entry for proceedings held before Judge Daniel R Dominguez : Status Conference held on 3/23/2005. (jf,) (Entered: 08/02/2005)
04/01/2005	32	Motion In Compliance *with Court Order Informing Agreement as to Discovery Issue* filed byKatherine Gonzalez-Valentin on behalf of all parties (Gonzalez-Valentin, Katherine) (Entered: 04/01/2005)
04/14/2005	33	ORDER granting 32 Motion In Compliance. The Court hereby sets the 17th day of May 2005, as the Dispositive Motion Deadline. Oppositions shall be filed within twenty (20) days. Counsel are advised that the dates provided are FIRM DATES AND NO FURTHER EXTENSIONS OF TIME

DATE	NO.	PROCEEDINGS
		SHALL BE GRANTED. IT IS SO ORDERED. . Signed by Judge Daniel R Dominguez on 04/14/05. (jf,) (Entered: 04/14/2005)
05/10/2005	34	Joint MOTION *FOR ISSUANCE OF* ORDER TO PRODUCE RECORDINGS filed byKatherine Gonzalez-Valentin on behalf of all parties (Attachments: # 1 Text of Proposed Order)(Gonzalez-Valentin, Katherine) Modified on 5/16/2005 correcting title (np,). (Entered: 05/10/2005)
05/10/2005		***SEE IMAGE ON 34*** MOTION for Extension of Time until 6/7/05 to file dispositive motions filed byKatherine Gonzalez-Valentin on behalf of all parties (np,) (Entered: 05/16/2005)
05/23/2005	35	ORDER granting34 Motion for Miscellaneous Relief. Therefore, the firm of A. Rodriguez Reporting Services and/or the individual reporter(s) engaged to provide professional services relating to the taking of depositions in the above captioned case is hereby ORDERED to produce on or before the 31st day of May 2005, the tape recordings for said depositions. Should the firm of A. Rodriguez Reporting Services and/or the individual reporter involved in providing services fail to comply with this Order, the Court shall impose sanctions which

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		may include contempt of Court. Plaintiff is ordered to serve this Order to the reporting firm on or before the 25th day of May 2005. Likewise, plaintiff shall file on or before the 26th day of May 2005, a motion evidencing that service was performed as ordered. Further, Plaintiff shall provide copies of the tapes to the defendant on or before the 2nd day of June 2005. Likewise, the Government shall file a motion informing the Court the date the requested tape recordings were provided by the plaintiffs . Signed by Judge Daniel R Dominguez on 05/23/05. (jf,) (Entered: 05/23/2005)
05/25/2005	36	First Motion In Compliance *with Order* filed byEdelmiro Antonio Salas-Gonzalez on behalf of Myrna Gomez-Perez (Attachments: # 1 Exhibit Transcript Sample# 2 Exhibit Return Service of Order)(Salas-Gonzalez, Edelmiro) (Entered: 05/25/2005)
05/26/2005	37	Second Motion In Compliance *with Order* filed byEdelmiro Antonio Salas-Gonzalez on behalf of Myrna Gomez-Perez (Salas-Gonzalez, Edelmiro) (Entered: 05/26/2005)
06/07/2005	38	Motion In Compliance *With Court Order* filed byKatherine Gonzalez-Valentin on behalf of John E. Potter (Gonzalez-Valentin, Katherine) (Entered: 06/07/2005)

DATE	NO.	PROCEEDINGS
06/12/2005	39	ORDER noted 36 Motion In Compliance, noted 37 Motion In Compliance, noted 38 Motion In Compliance . Signed by Judge Daniel R Dominguez on 06/12/05. (jf,) (Entered: 06/12/2005)
06/14/2005	40	CERTIFICATE OF SERVICE by John E. Potter re 38 Motion In Compliance *With Court Order* (Gonzalez-Valentin, Katherine) (Entered: 06/14/2005)
07/05/2005	41	MOTION for Extension of Time until July 6, 2005 to file Motion for Summary Judgment filed byKatherine Gonzalez-Valentin on behalf of John E. Potter Suggestions in opposition/response due by 7/18/2005 (Gonzalez-Valentin, Katherine) (Entered: 07/05/2005)
07/06/2005	42	MOTION for Extension of Time until July 7, 2005 to file summary judgment motion filed byKatherine Gonzalez-Valentin on behalf of John E. Potter Suggestions in opposition/response due by 7/19/2005 (Gonzalez-Valentin, Katherine) (Entered: 07/06/2005)
07/07/2005	43	MOTION for Summary Judgment *and Memorandum in Support Thereof* filed byKatherine Gonzalez-Valentin on behalf of John E. Potter Suggestions in Opposition to Summary Judgment due by 7/20/2005. (Gonzalez-Valentin, Katherine) (Entered: 07/07/2005)

DATE	NO.	PROCEEDINGS
07/07/2005	44	STATEMENT *OF MATERIAL FACTS OVER WHICH THERE ARE NO GENUINE ISSUES TO BE TRIED* filed by John E. Potter re: 4.3. MOTION for Summary Judgment *and Memorandum in Support Thereof filed* by John E. Potter,. (Attachments: #1 # 2 # 3 # 4 # 5 # 6 # 7 # 8 # 9 # 10 # 11 # 12 # 13 # 14 # 15 # 16 # 17 # 18 # 19 # 20 # 21 # 22 # 23 # 24 # 25 # 26 # 27 # 28 # 29 # 30 # 31 # 32 # 33 # 34 # 35 # 36 # 37 # 38 # 39 # 40 # 41 # 42 # 43 # 44) (Gonzalez-Valentin, Katherine) (Entered: 07/07/2005)
07/07/2005	45	MOTION for Leave to File Spanish language documents filed byKatherine Gonzalez-Valentin on behalf of John E. Potter (Gonzalez-Valentin, Katherine) (Entered: 07/07/2005)
07/19/2005	46	NOTICE *OF FILING OF TRANSLATION OF DOCUMENT* by John E. Potter re 44 Statement„ (Gonzalez-Valentin, Katherine) Modified on 7/20/2005. Filed Without attachment. (ft,). (Entered: 07/19/2005)
07/19/2005	47	NOTICE *to the Court* by John E. Potter re 46 Notice (Other) (Attachments: # 1)(Gonzalez-Valentin, Katherine) (Entered: 07/19/2005)
07/27/2005	48	RESPONSE in Opposition to Motion *for Summary Judgment and Memorandum of Law in Support Thereof*

DATE	NO.	PROCEEDINGS
		filed by Myrna Gomez-Perez Re: 43 MOTION for Summary Judgment *and Memorandum in Support Thereof* filed by John E. Potter, (Salas-Gonzalez, Edelmiro) (Entered: 07/27/2005)
07/27/2005	49	RESPONSE in Opposition to Motion *Statment of Material Fact Over Which there are no Genuine Issues to be Tried* filed by Myrna Gomez-Perez Re: 44 Statement„ filed by John E. Potter, (Attachments: # 1 Exhibit Ex. 1# 2 Exhibit Ex. 2# 3 Exhibit Ex. 3# 4 Exhibit Ex. 4# 5 Exhibit Ex. 5# 6 Exhibit Ex. 6# 7 Exhibit Ex. 7# 8 Exhibit Ex. 8)(Salas-Gonzalez, Edelmiro) (Entered: 07/27/2005)
08/05/2005	51	MOTION for Leave to File reply 43 MOTION for summary judgment *in Reply to Plaintiff's Opposition to Motion for Summary Judgment* filed by Katherine Gonzalez-Valentin on behalf of John E. Potter Suggestions in opposition/response due by 8/18/2005 (Gonzalez-Valentin, Katherine) Modified on 8/10/2005 adding text (np,). (Entered: 08/05/2005)
08/13/2005	52	ORDER terminating [] Motion for Extension of Time to File; granting/moot 45 Motion for Leave to File Spanish language documents, see Docket No. 46 . Signed by Judge Daniel R Dominguez on 08/12/05. (jf,) (Entered: 08/13/2005)

DATE	NO.	PROCEEDINGS
08/13/2005	53	ORDER granting in part and denying in part 51 Motion for Leave to File . The defendant is authorized to file a Reply on or before the 22nd day of August 2005. Said Reply shall not exceed a maximum of ten (10) pages and it shall not be a rehash of legal arguments previously presented to the Court or otherwise it shall be SUMMARILY DENIED. Likewise, plaintiff shall file a Surreply ten (10) days thereafter and shall be limited to a maximum length of ten (10)pages or it shall be also SUMMARILY DENIED. ABSOLUTELY ANY REQUESTS FOR AN EXTENSION OF TIME SHALL BE SUMMARILY DENIED. IT IS SO ORDERED. Signed by Judge Daniel R Dominguez on 08/12/05. (jf,) (Entered: 08/13/2005)
08/22/2005	54	MOTION for extension of time until August 30, 2005 filed byLisa E. Bhatia-Gautier on behalf of John E. Potter Suggestions in opposition/ response due by 9/6/2005 (Attachments: # 1) (Bhatia-Gautier, Lisa) (Entered: 08/22/2005)
08/22/2005	55	ORDER granting as requested 54 Motion for extension of time .Signed by Judge Daniel R Dominguez on 08/22/05. (jf,) (Entered: 08/22/2005)
08/30/2005	56	REPLY to Response to Motion *by Plaintiff in Opposition 43 Defendant's*

DATE	NO.	PROCEEDINGS
		Motion for Summary Judgment filed by John E. Potter Re: 51 MOTION for Leave to File Document *in Reply to Plaintiffs Opposition to Motion for Summary Judgment* filed by John E. Potter,, 54 MOTION for extension of time until August 30, 2005 filed by John E. Potter, (Gonzalez-Valentin, Katherine) Modified on 8/31/2005 creating link (np,). (Entered: 08/30/2005)
08/30/2005	57	STATEMENT *in Reply Relating to Motion for Summary Judgment and Reply* filed by John E. Potter. (Attachments: # 1 Exhibit 1# 2 Exhibit 2 - Cintron Declaration) (Gonzalez-Valentin, Katherine) (Entered: 08/31/2005)
09/07/2005	58	First MOTION for extension of time until 09/12/05 to File Sur-Reply 43 filed by Edelmiro Antonio Salas-Gonzalez on behalf of Myrna Gomez-Perez Suggestions in opposition/ response due by 9/20/2005 (Attachments: # 1 Exhibit Hospital Statements)(Salas-Gonzalez, Edelmiro) Modified on 9/8/2005 creating link (np,). (Entered: 09/07/2005)
09/09/2005	59	ORDER granting as requested 58 Motion for extension of time . Plaintiff is Granted until September 12, 2005 to file its Surreply. Signed by Judge Daniel R Dominguez on 09/09/05. (jf,) (Entered: 09/09/2005)

DATE	NO.	PROCEEDINGS
09/12/2005	60	SURREPLY to Reply to Opposition *Reply to Plaintiffs Opposition To Motion for Summary Judgment* filed by Myrna Gomez-Perez (Salas-Gonzalez, Edelmiro) (Entered: 09/12/2005)
09/12/2005	61	SURREPLY to Reply to Opposition *Defendants' Reply Statement of Material Fact* filed by Myrna Gomez-Perez (Attachments: # 1. Exhibit Excerpts Depo. Tony Cintron# 2 Exhibit Petition# 3 Exhibit Statement by Mirna Gomez# 4 Exhibit Ex. 1 Defendant's Answer to Production of Docs.# 5 Exhibit Ex. 5 Statment by Tony Cintron # 6 Exhibit Ex. 6 Excerpts Depo. Heriberto Ramos)(Salas-Gonzalez, Edelmiro) (Entered: 09/12/2005)
11/14/2005	62	ORDER REFERRING CASE to Magistrate Judge through the computarized random assignment system for Report and Recommendation on Motion for Summary Judgment . Signed by Judge Daniel R Dominguez on 11/14/05. (jf,) (Entered: 11/14/2005)
11/16/2005	63	MEMORANDUM OF THE CLERK: Pursuant to the REFERRAL ORDER issued by Judge Daniel R. Dominguez on 11/14/05 (dkt. #62) the Motion for Summary Judgment has been assigned through random drawing within the Case Assignment System to US Magistrate Judge Camille Velez-Rive for a report and recommendation.

DATE	NO.	PROCEEDINGS
		Signed by Clerk on 11/16/05. (li,) (Entered: 11/16/2005)
11/16/2005	64	ORDER OF RECUSAL. Magistrate Judge Camille L. Velez-Rive recused. Signed by Magistrate Judge Camille L. Velez-Rive on 11/16/05. (ljt) (Entered: 11/16/2005)
11/17/2005	65	MEMORANDUM OF THE CLERK: Pursuant to the RECUSAL ORDER of Magistrate Judge Camille Velez-Rive of November 16, 2005, (dkt. #64) the Motion For Summary Judgment has been reassigned through random drawing within the Case Assignment System to Magistrate Judge Gustavo A. Gelpi for a report and recommendation. Signed by Clerk on 11/17/05. (li,) (Entered: 11/17/2005)
01/30/2006	66	REPORT AND RECOMMENDATION GRANTING 43 MOTION for Summary Judgment filed by John E. Potter. *Objections to R&R due by 2/13/2006.* Signed by Magistrate Judge Gustavo A. Gelpi on 1-30-06. (nc,) (Entered: 01/30/2006)
01/30/2006	67	ORDER re 66 REPORT AND RECOMMENDATION re 43 MOTION for Summary Judgment *and Memorandum in Support Thereof* filed by John E. Potter. The Court forewarns the parties that no extensions of time shall be granted, and that failure to

DATE	NO.	PROCEEDINGS
		submit objections within the deadline provided shall be deemed by the Court as a waiver to said objections. Set Deadlines *Objections to R&R due by 2/13/2006* . Signed by Judge Daniel R Dominguez on 1/30/06. (jf,) (Entered: 01/30/2006)
01/31/2006	68	OBJECTION to 66 Report and Recommendation *of the Hon. Magistrate Judge* filed by Myrna Gomez-Perez (Salas-Gonzalez, Edelmiro) Modified on 2/9/2006 creating ling (np,). (Entered: 01/31/2006)
01/31/2006	69	MOTION for Leave to File Document *Objection to Report and Recommendations of the Hon. Magistrate Judge* filed byEdelmiro Antonio Salas-Gonzalez on behalf of Myrna Gomez-Perez Suggestions in opposition/response due by 2/13/2006 (Attachments: # 1 Exhibit TENDERED Objections to Report and Recommendation of the Magistrate Judge)(Salas-Gonzalez, Edelmiro) (Entered: 01/31/2006)
02/03/2006	70	MOTION to Withdraw as *Attorney of Record* Attorney as to Katherine Gonzalez-Valentin filed byKatherine Gonzalez-Valentin on behalf of John E. Potter (Gonzalez-Valentin, Katherine) (Entered: 02/03/2006)

DATE	NO.	PROCEEDINGS
02/03/2006	71	ORDER granting 70 Motion to Withdraw as Attorney. Attorney Katherine Gonzalez-Valentin terminated . Signed by Judge Gustavo A. Gelpi on 2/3/06. (sm,) (Entered: 02/03/2006)
02/16/2006	72	MOTION for Leave to Appear *Appearance* filed byMiguel A. Fernandez-Torres on behalf of John E. Potter, United States Postal Service Suggestions in opposition/response due by 3/1/2006 (Fernandez-Torres, Miguel) (Entered: 02/16/2006)
02/20/2006	73	ORDER granting 72 Motion for Leave to Appear. AUSA Miguel A. Fernandez may APPEAR as counsel of record for the United States of America in substitution of AUSA Katherine Gonzalez Valentin. IT IS SO ORDERED . Signed by Judge Daniel R Dominguez on 2/20/06. (jf,) (Entered: 02/20/2006)
02/28/2006	74	ORDER granting 43 motion for summary judgment, adopting Report and Recommendation re 66 Report and Recommendation . Signed by Judge Daniel R Dominguez on 2/28/06. (jf,) (Entered: 02/28/2006)
02/28/2006	75	JUDGMENT . Signed by Judge Daniel R Dominguez on 2/28/06. (jf,) (Entered: 02/28/2006)
03/08/2006	76	NOTICE OF APPEAL as to 75 Judgment, 74 Order on Motion for Summary Judgment, Report and Recom-

DATE	NO.	PROCEEDINGS
		mendation by Myrna Gomez-Perez. *Appeal Record due by 3/22/2006.* (Ramirez-de-Leon, Jose) (Entered: 03/08/2006)
03/08/2006		USCA Appeal Fees received $ 255.00 receipt number 161596 re 76 Notice of Appeal filed by Myrna Gomez-Perez, (ne,) (Entered: 03/08/2006)
04/05/2006	77	Certified and Transmitted Record on Appeal to US Court of Appeals re 76 Notice of Appeal (Dkts. 1,2,...,74-76) (xi,) (Entered: 04/05/2006)
05/26/2006	78	USCA Case Number 06-1614 for 76 Notice of Appeal filed by Myrna Gomez-Perez. (xi,) (Entered: 05/26/2006)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

06-1614

GÓMEZ-PÉREZ,
Plaintiff-Appellant,
v.

POTTER,
Defendant-Appellee.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
4/21/06		CIVIL CASE docketed. Opening forms sent. Notice of Appeal filed by Appellant Mirna Gomez-Perez. Appearance form due 5/5/06. Docketing Statement due 5/5/06. Transcript Report/Order due 5/5/06. [06-1614] (mani)
4/21/06		RECORD filed: 2 volume(s) consisting of docket entries 1,2,5,6,7,9,12,19,20, 22,24,27,35,43,44,47-50,56,57,60-62, 64-66,68,74-76. [1114901-1] [06-1614] (mani)
4/25/06		Involvement of attorney Ginette L. Milanes terminated. [06-1614] (mani)
4/25/06		Involvement of attorney Katherine Gonzalez Valentin terminated. [06-1614] (mani)
4/25/06		Involvement of attorney Isabel Munoz-Acosta terminated. [06-1614] (mani)

DATE	NO.	PROCEEDINGS
5/4/06		APPEARANCE filed by Miguel A. Fernandez-Torres for Appellee John E. Potter. [1119278-1] [06-1614] (mani)
5/4/06		APPEARANCE filed by Edelmiro A. Salas Gonzalez for Appellant Mirna Gomez-Perez. [1119316-1] [06-1614] (mani)
5/4/06		DOCKETING STATEMENT filed by Appellant Mirna Gomez-Perez. [06-1614] (mani)
5/4/06		Transcript Report/Order Form filed by Appellant Mirna Gomez-Perez. Transcript is not necessary on appeal. (see Section E of docketing statement) [06-1614] (mani)
5/4/06		BRIEFING SCHEDULE. Appellant's Brief due 6/13/06. [06-1614] (mani)
5/5/06		APPEARANCE filed by Jose L. Ramirez-de-Leon for Appellant Mirna Gomez-Perez. [1119697-1] [06-1614] (mani)
6/6/06		Informative motion re: DESIGNATION of contents of appendix to brief filed by Appellant Mirna Gomez-Perez. [06-1614] (mani)
6/14/06		MOTION to request oral argument to be held in Puerto Rico filed by Appellant Mirna Gomez-Perez. Certificate of service dated 6/13/06. [06-1614] (mani)

DATE	NO.	PROCEEDINGS
6/14/06		BRIEF filed by Appellant Mirna Gomez-Perez. Length: 34 pages/8,983 words, Copies: 10, delivered by mail. Certificate of service date 6/13/06. [1135318-1] Appellees brief due 7/14/06. [06-1614] (mani)
6/14/06		ELECTRONIC DOCUMENT brief filed by Appellant Mirna Gomez-Perez. [06-1614] (mani)
6/14/06		APPENDIX filed by Appellant Mirna Gomez-Perez. Copies: 5. Volumes: 2. Delivered by mail. Certificate of service date 6/13/06. [1135320-1] [06-1614] (mani)
6/16/06		ATTORNEY Nelson J. Perez-Sosa for Appellee US Postal Service added to case. [06-1614] (mani)
6/16/06		APPEARANCE filed by Nelson J. Perez-Sosa for Appellee US Postal Service. [1136096-1] [06-1614] (mani)
7/7/06		ORDER entered by Chief Judge Michael Boudin. The decision whether to schedule this appeal for oral argument will be made after briefing is completed, but if the court decides to hear argument, argument will be scheduled for a Puerto Rico sitting. (06-1614] (mani)
7/13/06		MOTION requesting an extension of time to file brief filed by Appellees. Ext. Code: OTH Certificate of service dated 7/12/06. [06-1614] (mani)

DATE	NO.	PROCEEDINGS
7/14/06		ORDER entered. Upon consideration of motion of appellee, It is ordered that the time for the appellee to file its brief be enlarged to and including August 14, 2006. [06-1614] (mani)
8/15/06		ATTORNEY August E. Flentje for Appellee John E. Potter added to case. [06-1614] (mani)
8/15/06		APPEARANCE filed by August E. Flentje for Appellee John E. Potter. (1156022-1] [06-1614] (mani)
8/15/06		BRIEF filed by Appellee John E. Potter Length: 11,122 words, Copies: 9, delivered by mail. Certificate of service date 8/14/06. [1156023-1] Reply due 8/29/06. [06-1614] (mani)
8/15/06		ELECTRONIC DOCUMENT brief filed by Appellee John E. Potter. (06-1614] (mani)
8/30/06		REPLY BRIEF filed by Appellant Mirna Gomez-Perez. Length: 14 pages, Copies: 9, delivered by mail. Certificate of service date 8/18/06. (1161507-1] [06-1614] (mani)
8/30/06		ELECTRONIC DOCUMENT reply brief filed by Appellant Mirna Gomez-Perez. [06-1614] (mani)
9/12/06		Assigned for the month of November, Puerto Rico sitting, (11/2/06). [06-1614] (kris)

DATE	NO.	PROCEEDINGS
9/22/06		Designation form filed. Attorney Miguel A. Fernandez-Torres for Appellee John E. Potter will be presenting oral argument. (kris)
9/25/06		Designation form filed. Attorney August E. Flentje for Appellee John E. Potter will be presenting oral argument. (kris)
10/31/06		SUPPLEMENTAL AUTHORITY pursuant to FRAP 28j filed by Appellee John E. Potter. [06-1614] (mani)
11/1/06		Second SUPPLEMENTAL AUTHORITY pursuant to FRAP 28j filed by Appellee John E. Potter. [06-1614] (mani)
11/2/06		CASE ARGUED 11/2/06. Torruella, Baldock, Howard, JJ. Edelmiro A. Salas Gonzalez for Appellant Mirna Gomez-Perez. August E. Flentje for Appellee John E. Potter. (kris)
2/5/07		SUPPLEMENTAL AUTHORITY pursuant to FRAP 28j filed by Appellee John E. Potter . Certificate of Service 1/31/07 [06-1614] (jenk)
2/9/07		OPINION filed. Judge Juan R. Torruella, Senior Judge Bobby R. Baldock, of the Tenth Circuit, sitting by designation and Judge Jeffrey R. Howard Signed Judge Juan R. Torruella, Authoring Judge PUBLISHED [1213221-1] [06-1614] (frnk)

DATE	NO.	PROCEEDINGS
2/9/07		JUDGMENT entered by Judge Juan R. Torruella, Senior Judge Bobby R. Baldock, of the Tenth Circuit, sitting by designation and Judge Jeffrey R. Howard: s cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. [1213222-1] [06-1614] (frnk)
3/7/07		ATTORNEY Joseph R. Guerra for Appellant Mirna Gomez-Perez added to case. [06-1614] (jenk)
3/7/07		APPEARANCE filed by Joseph R. Guerra for Appellant Mirna Gomez-Perez. [1222669-1] [06-1614] (jenk)
3/7/07		MOTION filed by Appellant Mirna Gomez-Perez for rehearing en banc. [1222670-1] Certificate of service dated 3/6/07 . [06-1614] (jenk)
3/7/07		ELECTRONIC DOCUMENT appellant's petition for rehearing en banc filed by Appellant Mirna Gomez-Perez. [06-1614] (jenk)
3/20/07		ORDER entered: The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active

DATE	NO.	PROCEEDINGS
		judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied. [06-1614] (jenk)
4/2/07		MANDATE ISSUED. [06-1614] (jenk)
4/2/07		RECORD consisting of 1, 2, 5-7, 9, 12, 19, 20, 22, 24, 27, 35, 43, 44, 47-50, 56, 57, 60-62, 64-66, 68, 74-76 returned to originating court. (cher)
4/6/07		U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on 3/30/07 [1235013-1]. Supreme Court case number: 06-1321. [06-1614] (susn)
10/2/07		U.S. SUPREME COURT ORDER granting petition for writ of certiorari filed in the Supreme Court on 03/30/0. A briefing schedule has been scheduled up until November 5, 2007. [06-1614] (meli)

IN THE UNITED DISTRICT COURT
DISTRICT OF PUERTO RICO

CIVIL NO. 03-2236

MYRNA GÓMEZ-PÉREZ
Plaintiff

vs.

JOHN E. POTTER, Postmaster General,
UNITED STATES POSTAL SERVICE
Defendant

UNLAWFUL EMPLOYMENT PRACTICE ACTION
FOR AGE DISCRIMINATION

DEMAND FOR JURY TRIAL

COMPLAINT

TO THE HONORABLE COURT:

COMES NOW the Plaintiff, Ms. MYRNA GÓMEZ-PÉREZ, through the undersigned attorney and respectfully submit this Complaint in the following terms:

I. JURISDICTION AND VENUE

1. This district court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, since the present action arises under the laws of the United States. It also has jurisdiction pursuant to 28 U.S.C. § 1339, since this action arises under an Act of Congress relating postal matters and under 42 U.S.C. § 2000e-5(f) (1) and (3), since it arises under the Equal Employment Opportunity Act provisions.

2. Venue is proper for this Court under 42 U.S.C. §2000e-5(f)(3), since the unlawful employment practice is alleged to have been committed within the judicial district of Puerto Rico, in which Plaintiff's employment records relevant to such practice are maintained and administered.

II. THE PARTIES

3. The plaintiff is a citizen of Puerto Rico and of the United States. Ms. Myrna Gómez-Pérez is 47, single and resident of Vega Alta, Puerto Rico. She is a United States Postal Service employee since 1987, presently assigned to the Sabana Seca Postal Station as a "part-time flexible" window clerk. Her address is P.O. Box 2120, Vega Alta, Puerto Rico 00692-2120.

4. Defendant John E. Potter is Postmaster General of the United States Postal Service. The United States Postal Service (hereinafter, "USPS") provides mail processing and delivery services to individuals and businesses within the United States, its territories and possessions, including the Commonwealth of Puerto Rico, where Plaintiff has been assigned, and where her employment records are maintained. The USPS was created as an independent establishment of the executive branch of the United States Government by the Postal Reorganization Act of 1970, 39 U.S.C. §§101 *et seq*. Its address is 475 L'Enfant Plaza SW, Washington, D.C. 20260-0010.

III. THE FACTS

5. Plaintiff, 47, is a postal employee with more than 15 years of experience working for the USPS. Up to October 2002, Plaintiff occupied a position of Regular ("Full-Time") Window Distribution Clerk in the Dorado Post Office.

6. In or around October 24, 2002, Plaintiff requested a voluntary transfer to the Moca Post Office to occupy a "part-time flexible" ("PTF") window distribution clerk position in said station in order to be near her mother, whom at the time was living in Moca, Puerto Rico and suffering from a serious illness and needed her assistance. Said request was granted, and on November 2, 2002, Plaintiff was assigned to the Moca Postal Station as a PTF Window Distribution Clerk.

7. In or around November 21, 2002, Plaintiff wrote to the Dorado Post Office Postmaster requesting to be reassigned back to her previous position in the Dorado Postal Station. She stated that her family emergency was solved, that her mother moved with Plaintiff's sisters in New York and she did not longer wanted to be assigned to the Moca Post Office.

8. Said petition was denied, and the reason for the denial was that Plaintiff's position was converted from Regular to "PTF" status and was granted to another postal employee who requested a transfer to the Dorado Post Office. Plaintiff later learned that said employee was female, much younger and with less experience than Plaintiff.

9. On or around December, 2002, Plaintiff submitted a grievance through the American Postal Workers Union (AFL-CIO) to the USPS Labor Relations in Puerto Rico, requesting to be transferred back to the Dorado Post Office position she hold until November 2, 2002. On December 16, 2002, USPS Labor Relations delegate in Puerto Rico denied the grievance.

10. On February 22, 2003, Plaintiff filed a complaint with the USPS Equal Employment Opportu-

nity Compliance and Appeals Processing Center of the New York Metropolitan Area, which has jurisdiction on the Puerto Rico postal region. In her complaint, Plaintiff alleged that she was object of discrimination because of age. She also complained that the continued assignment to the Moca Post Office was causing her undue hardship, since she had to drive 77 miles from her home to the station and 77 miles back, six (6) days per week, affecting her health and welfare. She also alleged that the conversion from Regular to PTF status entailed a wage rate reduction since her work hours were reduced.

11. While at the Moca Post Office, Plaintiff was object of jokes and ridicule from some peers after learning that she filed a EEO complaint, including the circulation of a "poster" showing a woman with eyeglasses painted on her and bearing the name "Mirna" in a satiric pose. Moreover, the Moca Post. Office management called her to a meeting to inform her that some employees were accusing her of sexually harassing them. Plaintiff was offended by the allegations and rejected them whatsoever. These allegations caused Plaintiff severe emotional strain and depression. After that, the Moca Postmaster cut her hours in half, affecting her salary even further. Plaintiff alleges that this was retaliation resulting from her filing of the complaint to the USPS' EEO office.

12. The USPS' EEO Center assigned Plaintiff's complaint to an investigator, who filed an Investigative Report and copy of it was sent to Plaintiff on May 5, 2003. Said report states that the Dorado Postmaster was interviewed and denied any discrimination. Since none of the employees in the Moca Postal Station requested a reassignment other than Plaintiff, they were not similarly situated and thus,

the investigator concluded that there was no discrimination because of age in the denial of her transfer request to the Dorado Post Office. Plaintiff was not interviewed by the investigator whatsoever.

13. On May 31st, 2003, Plaintiff was assigned the Sabana Seca, (Toa Baja) Postal Station as a "PTF" Window Distribution Clerk, position she currently holds.

14. On August 20, 2003, the EEO Compliance and Appeals Center for the New York Metropolitan Area and the Caribbean issued a final agency decision, stating that Plaintiff allegedly failed to establish a prima facie case of discrimination. The USPS' EEO Center concluded that Plaintiff was not discriminated against and informed her that it was closing the case with a finding of no discrimination. Counsel of Plaintiff received such decision by August 25, 2003.

15. Plaintiff affirmatively alleges that she was object of discrimination because of her age and that her position in Dorado was granted to a younger, less experienced female employee. Plaintiff further alleges that age was a determining factor in (1) the denial of transfer to her old position in Dorado, and (2) in the transfer of a younger, less experience postal employee to Plaintiff's position in Dorado.

16. Plaintiff further alleges that she was object of retaliation for submitting a complaint to the USPS' EEO Center, and suffered hardship while at the Moca Postal Station as well.

17. Such discriminatory acts, as well as the retaliatory actions caused in Plaintiff severe mental anguish and stress, as well as other health problems, including back pains due to the long drives from her

home to the Moca Station. In addition, her salary was reduced, suffering financial stress as a consequence.

IV. CAUSES OF ACTION

1. *First Cause of Action*

18. Defendant John E. Potter, acting through his supervisors and employees, engaged in an act of discrimination because of age against Plaintiff, by denying her request for transfer to her previous position as Regular Window Distribution Clerk in the Dorado Post Office, and by conceding such position to a younger, less experienced female postal employee. It is affirmatively alleged that age was a determining factor in the above mentioned actions.

2. *Second Cause of Action*

19. Defendant John E. Potter, acting through his supervisors and employees, engaged in retaliatory acts against Plaintiff for her decision to submit a complaint to the USPS' Regional EEO Compliance and Appeals Processing Center, by maintaining Plaintiff in the Moca Post Office for a prolonged period of time, not attending Plaintiff's complaints of peer behavior, raising offensive charges against Plaintiff, which caused her severe mental and emotional strain and depression, and finally by cutting her working hours in half, thereby reducing her salary.

V. THE RELIEF

20. Plaintiff requests a trial by jury in accordance to the provisions of the Constitution of the United States.

21. Plaintiff prays this Honorable Court to issue a Declaratory Judgment holding that defendant discriminated against plaintiff because of her age; en-

joining the respondent from engaging in such unlawful employment practices, and further ordering her reinstatement to her position as a Regular ("Full-Time") Window Distribution Clerk in the Dorado Post Office, with all benefits which she requested on November 22, 2002.

22. Plaintiff prays this Honorable Court to grant her back pay under 42 U.S.C. §2000e-5(g)(1), which Plaintiff estimates in no less than $25,000.00 since November 22, 2002.

23. Plaintiff prays this Honorable Court to grant her damages for mental anguish, severe emotional distress and depression as a direct consequence of defendant's actions, which Plaintiff estimates in no less than $250,000.00.

AND for costs, expert witnesses' fees, attorney's fees pursuant to 42 U.S.C. § 2000e-5(g)(2)(B), and such other and further relief as the Court deems proper.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 18th day of November, 2003.

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IN THE

Supreme Court of the United States

MYRNA GÓMEZ-PEREZ,

Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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November 13, 2007

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QUESTION PRESENTED

Whether the federal-sector provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633a(a), prohibits retaliation against employees who complain of age discrimination.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 476 F.3d 54 and is reproduced in the appendix to the petition for a writ of certiorari ("Pet. App.") 1a-10a. The opinion denying the petition for rehearing and rehearing en banc, dated March 20, 2007, is reproduced at Pet. App. 33a. The opinion of the United States District Court for the District of Puerto Rico, dated Feb. 28, 2006, is unreported and is reproduced at Pet. App. 11a-32a.

JURISDICTION

The opinion and judgment of the court of appeals were issued on February 9, 2007. A timely petition for rehearing and rehearing en banc was denied on March 20, 2007. The petition for a writ of certiorari was filed on March 30, 2007. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The federal-sector provision of the Age Discrimination in Employment Act mandates that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age" in specified departments and agencies of the Federal Government, including the United States Postal Service, "shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). The full text of § 633a is set forth at Pet. App. 34a-37a.

INTRODUCTION

In 1974, Congress extended the protections of the Age Discrimination in Employment Act ("ADEA") to

federal workers by adopting a sweeping, stand-alone age-discrimination ban. This provision requires that "*[a]ll* personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from *any* discrimination based on age." 29 U.S.C. § 633a(a) (emphases added). This broad and unqualified language bars retaliation against protected workers who bring charges of age discrimination. This Court recently concluded that the less sweeping discrimination ban in Title IX clearly bars retaliation, *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), and the government itself endorsed that plain language reading. Congress necessarily understood the even broader language of § 633a(a) to prohibit retaliation. It not only adopted this provision a mere five years after this Court construed a general discrimination ban to prohibit retaliation, but also modeled § 633a(a) directly on Title VII's federal-sector discrimination ban, a provision Congress would have understood, based on its structure and recent administrative interpretations, to proscribe retaliation as a form of unlawful discrimination.

In the decision below, however, the First Circuit concluded that § 633a(a) permits federal employers to retaliate against older workers who bring charges of age discrimination. The lower court acknowledged the D.C. Circuit's contrary decision in *Forman* v. *Small*, 271 F.3d 285 (D.C. Cir. 2001), and did not dispute that court's observation that a workplace cannot be "'free from *any* discrimination based on age' if, in response to an age discrimination claim, a federal employer c[an] fire or take other action that [i]s adverse to an employee." *Id.* at 297. Nevertheless, the First Circuit inferred that Congress intended to leave workers unprotected from such

conduct because the ADEA's private-sector provisions expressly use the word "retaliation," while § 633a(a) does not. This reasoning is flatly inconsistent with *Jackson*'s textual analysis of the stand-alone discrimination ban in Title IX. Indeed, the First Circuit drew precisely the type of apples-to-oranges comparison between different statutory structures that this Court (at the government's urging) rejected in *Jackson*. The lower court nowhere explained, moreover, why Congress would permit federal employers to engage in retaliation, or how § 633a(a) could achieve its purpose if employers are free to engage in such conduct.

As petitioner explains in detail below, the language of § 633a(a), the relevant legal background that informed Congress's use of that language, and the purpose, legislative history and regulatory interpretation of the provision all confirm that its sweeping and unqualified prohibition of age discrimination encompasses retaliation against a protected employee because that employee complains of discrimination based on age. The First Circuit's contrary interpretation should be reversed.

STATEMENT OF THE CASE

A. Statutory Background

As enacted in 1967, the ADEA applied only to private employers. Its procedural and enforcement mechanisms were an amalgam of provisions drawn from several other statutes, *Lorillard* v. *Pons*, 434 U.S. 575, 578 (1978), but the ADEA's substantive prohibitions "were derived *in haec verba* from Title VII." *Id.* at 584. At the time, Title VII also applied only to private employers.

In 1972, Congress extended Title VII to federal employers. Although regulations issued by the Civil Service Commission ("CSC") already barred discrimination in federal employment based on race, color, religion, sex, or national origin, see 5 C.F.R. § 713.201 *et seq.* (1968), Congress believed these regulations "were ineffective." *Brown* v. *GSA*, 425 U.S. 820, 826 (1976). Accordingly, it broadly required that "[a]ll personnel actions affecting employees or applicants for employment" in various parts of the federal government "shall be made *free from any discrimination based on* race, color, religion, sex, or national origin." Equal Employment Opportunity Act of 1972 ("EEO Act"), Pub. L. No. 92-261, § 717(a), 86 Stat. 103, 111 (codified at 42 U.S.C. § 2000e-16(a)) (emphasis added).

The structure of the EEO Act confirms that Title VII's new federal-sector prohibition barred retaliation. Congress provided that several of Title VII's private-sector remedial provisions would apply to violations of the federal-sector discrimination ban. See *id.* § 717(d), 86 Stat. at 111-12 (codified as amended at 42 U.S.C. § 2000e-16(d)). One of these incorporated provisions provides a remedy for retaliation. See 42 U.S.C. § 2000e-5(g)(2)(A) (providing a remedy for violations of § 2000e-3(a), which prohibits reprisals). Shortly after Congress extended Title VII to federal employers, moreover, the CSC, which had been given broad power to enforce the new federal-sector discrimination ban, interpreted it to proscribe retaliation against those who bring charges of discrimination. See 37 Fed. Reg. 22,717, 22,723 (Oct. 21, 1972) (§ 713.262(a)).

It was against this backdrop that Congress amended the ADEA to extend it to federal employers. Congress modeled § 633a(a) directly on Title VII's

federal-sector discrimination ban, *Lehman* v. *Nakshian*, 453 U.S. 156, 163-64, 167 n.15 (1981), providing in virtually identical terms that "[a]ll personnel actions affecting employees or applicants for employment" in various parts of the federal government "shall be made free from any discrimination based on age." Pub. L. No. 93-259, § 15(a), 88 Stat. 55, 74-75 (1974) (codified at 29 U.S.C. § 633a(a)). Shortly thereafter, the CSC, which had been given the same broad authority to enforce § 633a(a) that it had been given to enforce Title VII's federal-sector prohibition, issued regulations interpreting the new provision to prohibit retaliation. See 39 Fed. Reg. 24,351 (July 2, 1974).

In 1978, Congress amended the ADEA in several respects. Most notably, Congress subjected federal employers to more stringent requirements: it eliminated the upper age limit for federal employees, thereby eliminating mandatory retirement in the federal sector in most instances; by contrast, it merely increased the coverage of the private-sector provisions from age 65 to age 70. See Pub. L. No. 95-256, §§ 3, 5, 92 Stat. 189, 189, 192 (1978). Congress also added subsection (f), which provides that personnel actions covered by § 633a(a) "shall not be subject to, or affected by, any provision of this [chapter], other than the provisions of section [631(b)] of this [title] and the provisions of this section." *Id.* § 5(e), 92 Stat. at 191-92 (codified at 29 U.S.C. § 633a(f)). The accompanying House Report explained that subsection (f) ensured that restrictions and limitations in the private-sector provisions of the Act "do not apply to [§ 633a(a)]." H.R. Rep. No. 95-527, pt. 1, at 11 (1977), *reprinted in Legislative History of the Age Discrimination in Employment Act* 361, 371 (EEOC 1981) ("ADEA Leg. Hist.").

B. Factual And Procedural Background

On February 22, 2003, petitioner Myrna Gómez-Perez, a 45-year-old window distribution clerk in the Moca, Puerto Rico Post Office, filed an equal employment opportunity ("EEO") complaint against the United States Postal Service ("Postal Service"). JA 31-32. In her EEO complaint, petitioner alleged that she had been discriminated against on the basis of her age when her supervisor denied her request for a transfer from her part-time position in the Moca Post Office to the full-time position she previously held in the Dorado Post Office. *Id* at 32.

After filing her EEO complaint, petitioner was subjected to a series of reprisals. *Id.* She was called to meetings at which groundless charges of sexual harassment were leveled against her. *Id.* She was harassed and mocked by co-workers. *Id.* Postal Service posters concerning sexual harassment were defaced and her name was written on them. *Id.* And her hours were drastically reduced. *Id.*

On November 18, 2003, petitioner filed this suit, alleging, *inter alia*, that respondent had violated § 633a(a) of the ADEA by retaliating against her for filing an age discrimination complaint. *Id.* at 1, 33-34. Respondent moved for summary judgment. The district court, adopting the report and recommendation of a magistrate judge, granted respondent's motion on the ground that the ADEA did not waive the Postal Service's sovereign immunity with respect to retaliation claims. Pet. App. 11a-32a.

The court of appeals affirmed on different grounds. It held that the Postal Service's "sue and be sued" clause, 39 U.S.C. § 401(1), waived the agency's sovereign immunity. Pet. App. 3a-4a. It concluded,

however, that § 633a(a) does not provide "a cause of action for retaliation as the result of having filed an age-discrimination related complaint." *Id.* at 10a.

The court of appeals believed that § 633a(a) does not prohibit reprisals because the word "retaliation" is not used in the text of the statute. Pet. App. 4a-5a. Although this Court had recently concluded that, as a matter of plain language, a statute barring "discrimination" "on the basis of sex" prohibits retaliation against persons because they complain about sex discrimination, *Jackson*, 544 U.S. at 173-74, the First Circuit deemed *Jackson* inapposite. It concluded that this Court's textual analysis of Title IX had no bearing here, because Title IX, unlike § 633a(a), is enforced through an implied cause of action, and because *Jackson* had emphasized the important role third-party complaints play in the enforcement of Title IX. Pet. App. 6a-7a. In addition, *Jackson* presumed, see 544 U.S. at 176, that the Congress that enacted Title IX was aware of the decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (holding that a general race-discrimination ban barred retaliation against those who speak out against such discrimination). But the court of appeals deemed this presumption inapplicable here, because it found "no evidence in the legislative history that the ADEA's federal sector provisions were adopted in a similar context of claims by federal employees for retaliation for speaking out against age discrimination." Pet. App. 7a.

The First Circuit also believed that, because § 623(d) expressly bars retaliation, while § 633a(a) does not, "Congress intended for the ADEA to prohibit retaliation by private employers, but not by federal employers." Pet. App. 7a-8a. The First Circuit rejected the reasoning of the D.C. Circuit, *id.*

at 8a, which had concluded that § 633a(a)'s sweeping language could not be narrowed based on a comparison with the ADEA's private-sector prohibition, "which is narrowly drawn and sets forth specific prohibited forms of age discrimination," rather than a single, comprehensive ban. *Forman*, 271 F.3d at 296. The First Circuit also believed that subsection (f) of § 633a was intended to ensure that the "expansive private-sector provisions of the ADEA" are not extended to federal employees. Pet. App. 10a.

SUMMARY OF ARGUMENT

I. By its plain terms, § 633a(a)'s categorical requirement that "[a]ll personnel actions affecting" older workers "shall be made free from *any* discrimination based on age" prohibits retaliation against an older worker for bringing an age-discrimination charge. When an employer punishes employees *because* they exercise their protected-status right, animus towards their protected status (and the rights that go with that status) is a substantial motivating factor for the punishment. Moreover, because retaliation facilitates discrimination, § 633a(a) must prohibit such conduct to ensure that *all* personnel actions are free from *any* age discrimination. In *Jackson*, the government itself argued—and this Court held—that, by its plain terms, Title IX's prohibition on "discrimination" "on the basis of sex" bars retaliation against a non-class member because he complained about unlawful sex discrimination. Because § 633a(a)'s proscription is even broader, and because petitioner is a member of the protected class, it is clearer here than it was in *Jackson* that the statutory language prohibits the retaliation alleged.

Three relevant background principles confirm that the enacting Congress would have understood the language of § 633a(a) to prohibit retaliation. First, Congress legislated only a few years after this Court had construed a general antidiscrimination provision to bar retaliation against those who advocate the rights of persons protected by that ban. *Sullivan*, 396 U.S. at 237. Congress would have expected § 633a(a)'s sweeping discrimination ban to be construed in this same manner. Second, it modeled § 633a(a) on Title VII's federal-sector discrimination ban, which prohibits retaliation against those who bring discrimination charges. Thus, Congress must have intended the federal age-discrimination ban to have the same scope. Third, by 1974, the agency charged with enforcing Title VII's federal-sector discrimination ban had construed it to bar retaliation. Congress is properly presumed to have been aware of that interpretation, and to have intended to incorporate the same meaning, when it used Title VII's federal-sector ban as the model for § 633a(a). *Lorillard*, 434 U.S. at 585.

Section 633a(a)'s purpose confirms that Congress intended it to encompass retaliation. Numerous statutes reflect Congress's recognition that discrimination bans cannot achieve their goals if employers are free to retaliate against those who bring discrimination charges. Contrary to the government's claims below, Congress could not have thought federal workers were already protected from reprisals for bringing charges of age discrimination. Age discrimination was not prohibited prior to 1974, and it was only after the enactment of § 633a(a) that federal regulations were amended to prohibit reprisals against those who complained of such discrimination.

The legislative history, moreover, is devoid of any evidence that Congress intended to leave federal workers unprotected from reprisals if they challenged unlawful age discrimination, or that Congress thought workers already enjoyed such protections. To the contrary, numerous statements in the legislative record make clear that Congress intended to give federal workers the same substantive rights that private-sector workers had. Shortly after Congress enacted § 633a(a), the CSC, which had been given broad authority to enforce the provision, construed it to bar retaliation; after enforcement authority was transferred to the Equal Employment Opportunity Commission ("EEOC"), the latter agency issued regulations affirming that interpretation.

II. The First Circuit's contrary interpretation is incorrect. The lower court improperly assumed that, because § 633a(a) does not mention retaliation, it cannot prohibit such conduct. The lower court then relied on irrelevant distinctions to dismiss this Court's contrary textual analysis in *Jackson*. While Title IX is enforced through an implied cause of action, this Court relied on the *text* of Title IX to determine that it prohibited retaliation. The importance of third-party complaints to enforcement of Title IX had no bearing on the Court's conclusion that the statute's text barred retaliation. And *Jackson*'s presumption that the 1972 Congress adopted that text with an knowledge of this Court's ruling in *Sullivan* is fully applicable to the 1974 Congress that enacted § 633a(a).

The lower court's structural analysis was equally flawed. In *Jackson*, both the government itself and this Court rejected precisely the type of inapposite comparison the First Circuit relied on to narrow § 633a(a)'s scope. Just as Title VII's private-employer

provision, which sets forth a series of narrow proscriptions, provided no basis for narrowing Title IX's broad, stand-alone ban, so too here, the ADEA's private-employer provisions (which were derived *in haec verba* from Title VII's private-sector provision) provide no basis for narrowing § 633a(a)'s even broader, stand-alone prohibition. Nor does subsection (f) demonstrate that Congress intended to leave federal workers without protection from retaliation. By providing that federal personnel actions "shall not be subject to" the ADEA's private-sector provisions, 29 U.S.C. § 633a(f), this provision ensures that the *limitations* of the private-sector provisions are not applied to actions under § 633a.

Finally, principles of sovereign immunity do not justify the conclusion that Congress left federal workers without protection from retaliation. Because Congress waived the Postal Service's immunity through a broad sue-and-be-sued clause, and because § 633a(a) indisputably applies to the Service, the First Circuit correctly ruled that sovereign immunity is irrelevant here. Even without this waiver, however, the government's invocation of immunity principles is unavailing. The rule requiring strict construction of immunity waivers applies to provisions governing the government's amenability to suit, the incidents of such suits (*e.g.*, the right to a jury trial), and the relief available in such suits; that rule is not properly used to narrow substantive norms that might be judicially enforced as a result of a waiver. But even if the rule applies to such norms, § 633a(a) clearly proscribes retaliation—particularly when read in light of the background principles that informed Congress's understanding of its language—and thus satisfies the clear statement requirement for waiving sovereign immunity.

ARGUMENT

The text, relevant legal background, purpose, legislative history and regulatory interpretation of § 633a all confirm that its sweeping and unqualified requirement that "[a]ll personnel actions affecting" older workers "shall be made free from *any* discrimination based on age," *id.* § 633a(a) (emphasis added), bars retaliation against a protected employee because that employee complains of discrimination based on age. The contrary reading that the First Circuit and the government advanced below is demonstrably incorrect.

I. SECTION 633a(a) BARS RETALIATION AGAINST A PROTECTED EMPLOYEE BECAUSE THAT EMPLOYEE COMPLAINS OF DISCRIMINATION BASED ON AGE.

A. The Text Of Section 633a(a) Bars Reprisals Against Protected Workers Because They Complain About Age Discrimination.

By its plain terms, § 633a(a) proscribes retaliation against a protected older employee because that employee complains about being subjected to age discrimination. Indeed, the requirement that "*[a]ll personnel actions* affecting employees or applicants for employment who are at least 40 years of age . . . *shall be made free from any* discrimination based on age," *id.* § 633a(a) (emphases added), is even broader and more categorical than the language of Title IX, which prohibits retaliation. See *Jackson*, 544 U.S. at 173-74. The text of § 633a(a) prohibits retaliation in two distinct ways.

First, when a federal employer retaliates against a protected older employee *because* the employee complains about age discrimination, the employer's

actions are motivated not merely by the employee's conduct (complaining) but also by the content of the complaint (an allegation of age discrimination). The employee suffers retaliation not because he is an older worker who complains too much, or complains about things unrelated to his age (*e.g.*, substandard working conditions), but because he complains that he has been denied rights to which he is entitled *only by virtue of his protected status*. Thus, when an employer retaliates against a worker for seeking to vindicate protected-status rights, animus towards that protected status (and the rights that go with that status) is a substantial motivating factor for the retaliation. Cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (where activities "are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed"). Section 633a(a) "encompasses a claim of retaliation because analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor." *Forman*, 271 F.3d at 296 (internal quotation marks omitted).

Second, § 633a(a) necessarily prohibits retaliation, because such conduct is inimical to the statute's requirement that *all* personnel actions be made free from *any* discrimination based on age. Retaliation has "a symbiotic and inseparable relationship to intentional . . . discrimination"; it "serves as a means of implementing or actually engaging in intentional discrimination by encouraging such discrimination and removing or punishing those who oppose it." *Peters* v. *Jenney*, 327 F.3d 307, 318 (4th Cir. 2003). Retaliation thus fosters the "perpetuation of [discrimination]." *Sullivan*, 396 U.S. at 237. Accordingly, where an employer can retaliate against

older workers who challenge age discrimination, *all* personnel actions affecting protected workers cannot be made free from *any* age discrimination: the existence of retaliation encourages and perpetuates other acts of age discrimination. Thus, the federal age discrimination ban must bar retaliation in order to ensure other personnel actions are not infected with unlawful bias against older workers.

In *Jackson*, both the government itself and, more importantly, this Court read a less sweeping discrimination ban in Title IX to encompass retaliation against those who complain of intentional discrimination against protected persons, even if the victim of the retaliation is not a member of the protected class. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In *Jackson*, this Court held that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action." 544 U.S. at 173. This is so, the Court explained, because

> [r]etaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional

> "discrimination" "on the basis of sex," in violation of Title IX.

Id. at 173-74 (citations omitted).

In its *amicus* filing in *Jackson*, the United States had urged the Court to adopt this plain-language reading. It argued that a Title IX recipient that

> purposefully retaliates against a complainant because the complaint is about intentional sex discrimination, as opposed to some other matter, subjects the complainant to intentional "discrimination" "on the basis of sex."

Brief of the United States as *Amicus Curiae* Supporting Petitioner at 5, in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005) ("U.S. *Jackson* Br.") at 5.[1] The government explained that Title IX's "on the basis of sex" limitation requires that "'sex' must have 'actually played a role in th[e] [decision-making] process and had a determinative influence on the outcome.'" *Id.* at 10 (alterations in original) (quoting *Hazen Paper* v. *Biggins*, 507 U.S. 604, 610 (1993)). This requirement is not met if a recipient simply "retaliates against all complainers as a class, without taking into account the subject matter of the complaint." *Id.* But the statutory requirement is satisfied when the recipient "retaliates against [the] complainant because the complaint is about intentional sex discrimination." *Id.*

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[1] *See also* U.S. *Jackson* Br. at 8 ("retaliation against a person because that person has filed a sex discrimination complaint is a form of intentional sex discrimination"); *id.* at 9 ("[w]hen a recipient purposefully retaliates against an individual because that individual has complained about intentional sex discrimination . . . the recipient can readily be viewed as having subjected the person to 'discrimination' 'on the basis of sex'").

The Court's interpretation of "discrimination" "on the basis of sex" in *Jackson* controls here. The language of § 633a(a) is even broader than that of Title IX. While Title IX provides that no person shall be "subjected to discrimination" "on the basis of" a protected status, § 633a(a) provides that "*[a]ll* personnel actions affecting" protected persons "shall be made free from *any* discrimination based on" their protected status. 29 U.S.C. § 633a(a) (emphases added). As the D.C. Circuit recognized, this prohibition is "sweeping," "comprehensive," and "unqualified." *Forman*, 271 F.3d at 296-97. It follows *a fortiori* from *Jackson*, therefore, that this categorical mandate proscribes retaliation against a protected older worker because that worker complains of being discriminated against based on age. Indeed, the retaliation in this case falls even more squarely within the discrimination ban than the conduct at issue in *Jackson* did, as petitioner is a member of the protected group and alleges that she suffered retaliation because she sought to vindicate her own right to be free of age discrimination.

B. The Background Against Which Section 633a(a) Was Enacted Confirms That It Bars Retaliation.

The plain meaning of § 633a(a)'s sweeping ban is confirmed by several background legal principles that informed Congress's understanding of the language it used to extend the ADEA to federal workers. Indeed, Congress had at least three reasons to believe that the language of § 633a(a) encompassed retaliation. First, Congress was legislating only five years after this Court had interpreted a general discrimination ban to prohibit retaliation against those who advocate the rights of persons protected by that ban. Second, Congress modeled the ADEA's federal age-

discrimination ban on the federal-sector provision of Title VII, and the structure of Title VII makes clear that its federal-sector discrimination ban prohibits retaliation. Third, Congress modeled § 633a(a) on Title VII's federal-sector provision after that Title VII provision had been interpreted by the administering agency to encompass reprisals.

1. In light of *Sullivan*, Congress understood that § 633a(a)'s language would bar retaliation.

This Court's decision in *Sullivan* is an essential part of the relevant legal context that informed Congress's understanding of the language it used in § 633a(a). Sullivan, a white man, rented a house to Freeman, a black man, and assigned him a membership share that permitted him to use a private park. The corporation that owned the park refused to accept the assignment because of Freeman's race. When Sullivan protested that refusal, he was expelled from the corporation. He and Freeman both sued under 42 U.S.C. § 1982, which provides that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," *id.*, and thus prohibits "racial discrimination . . . in the sale and rental of property." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

The Court held that Sullivan could sue under § 1982 not only because he had been denied the right to complete his transaction, but also for the retaliatory expulsion he had suffered for advocating Freeman's rights. The Court explained that, "[i]f that sanction . . . can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction

would give impetus to the perpetuation of racial restrictions on property." 396 U.S. at 237.

In *Jackson*, the government argued that the Congress that enacted Title IX in 1972 was properly presumed to have been aware of *Sullivan* and "would have seen no need to enact a prohibition that specifically referred to retaliation." U.S. *Jackson* Br. at 11-12. This Court agreed. It was "'not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [Title IX] to be interpreted in conformity with [it].'" *Jackson*, 544 U.S. at 176 (alterations in original) (quoting *Cannon* v. *University of Chi.*, 441 U.S. 677, 699 (1979)). Thus, "discrimination" "on the basis of sex" in Title IX was properly interpreted to encompass retaliation against a male coach because of his "advocacy of the rights of the girls' basketball team." *Id.*

This reasoning applies with equal, if not greater, force here. The bill that ultimately became § 633a was introduced in 1972, see *Lehman* v. *Nakshian*, 453 U.S. 156, 166 n.14 (1981), the same year Congress adopted Title IX. Section 633a was enacted just two years later. The 1974 Congress is properly presumed to have had the same "thorough[] familiar[ity] with" *Sullivan* that the 1972 Congress was presumed to have had. See *Cannon*, 441 U.S. at 698 n.23 (upholding an implied right of action in part because "[i]n the decade preceding the enactment of Title IX," this Court had found implied rights of action in several cases); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 77 (1992) (Scalia, J., concurring) (proper to presume congressional awareness in 1972 of the 1946 decision in *Bell* v. *Hood*, 327 U.S. 678 (1946)).

Moreover, this presumed familiarity with *Sullivan* provides an *a fortiori* basis for concluding that § 633a(a) proscribes the retaliation at issue here. A Congress that expected a general discrimination ban to cover retaliation against persons *outside* the protected class when they advocate the rights of persons within that class would necessarily expect that same prohibition to protect persons *within* the class who suffer retaliation because they seek to vindicate their own right to be free from discrimination.

2. Section 633a(a) was modeled on Title VII's federal-sector discrimination ban, which bars retaliation.

Congress's understanding of § 633a(a)'s sweeping language was also informed by Title VII's federal-sector discrimination ban, which Congress used as the model for extending the ADEA to federal workers. The structure of Title VII makes clear that its federal-sector discrimination ban encompasses retaliation. Congress is properly presumed to have understood this when it incorporated the language of that Title VII ban in § 633a(a).

In 1972, Congress amended Title VII to extend its protections to most federal employees. In words virtually identical to those it would use two years later in § 633a(a), Congress provided that "[a]ll personnel actions affecting employees or applicants for employment" in various parts of the federal government "shall be made *free from any discrimination based on* race, color, religion, sex, or national origin." EEO Act, Pub. L. No. 92-261, § 717(a), 86 Stat. at 111 (codified at 42 U.S.C. § 2000e-16(a)) (emphasis added). Congress further provided that certain of Title VII's private-sector remedial provisions would apply in suits by federal

employees. See *id.* § 717(d), 86 Stat. at 111-12 (codified as amended at 42 U.S.C. § 2000e-16(d)).

Significantly, one of the incorporated remedial provisions is § 706(g). See 42 U.S.C. § 2000e-16(d) (incorporating § 2000e-5(f) through (k)). Section 706(g) provides, among other things, that a court may order the hiring, reinstatement or promotion of a plaintiff, and an award of backpay, only if the plaintiff was refused employment or advancement or suspended or discharged due to proscribed discrimination or a "violation of section 2000e-3(a) [§ 704(a)]." *Id.* § 2000e-5(g)(2)(A). Section 704(a), in turn, prohibits discrimination against employees who oppose any unlawful practice or bring charges of unlawful discrimination. *Id.* § 2000e-3(a).

Thus, Congress expressly included a provision authorizing relief for victims of retaliation among the remedies for violations of Title VII's sweeping federal-sector discrimination ban. There would have been no reason to include such a remedy if Title VII's federal-sector discrimination ban did not prohibit such retaliation in the first place. The inclusion of this remedy therefore confirms that Title VII's requirement that "all personnel actions affecting" certain federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin" bars retaliation against protected class members who complain about being subjected to such discrimination.[2]

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[2] The First Circuit misconstrued the import of Title VII's federal-sector scheme. Congress did not incorporate into that scheme the *substantive* retaliation ban of Title VII's private-sector provisions, as the First Circuit believed. *See* Pet. App. 9a. Congress incorporated only "[t]he provisions of 2000e-5(f) through (k)," 42 U.S.C. § 2000e-16(d), and Title VII's private-sector retaliation ban is set forth in § 2000e-3(a). Nor is it

Two years later, Congress patterned § 633a(a) "directly after" Title VII's federal-sector discrimination ban. *Lehman*, 453 U.S. at 167 n.15. In doing so, Congress is properly presumed to have understood the scope of that Title VII provision, including the fact that it prohibited retaliatory discrimination. The 1974 Congress, therefore, is properly presumed to have intended § 633a(a) to achieve the same prohibition with respect to age discrimination.

3. Congress intended to adopt the administrative interpretation of Title VII's federal-sector discrimination ban when it used that ban as the model for § 633a(a).

Finally, Congress is properly presumed to have banned retaliation against protected older workers who complain of age discrimination because the Title VII federal-sector discrimination ban that served as the model for § 633a(a) had previously been construed to bar retaliation. Congress is presumed to have been aware of this administrative interpretation, and to have incorporated this meaning in § 633a(a).

When Congress extended Title VII's protections to federal workers in 1972, it also authorized the Civil Service Commission to enforce this prohibition through appropriate regulations. EEO Act, Pub. L. No. 92-261, § 717(b), 86 Stat. at 111 (codified at 42 U.S.C. § 2000e-16(b)). Within months, the CSC

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relevant that § 633a does not incorporate the ADEA's private-sector remedies. What matters is that § 633a(a) was modeled on Title VII's federal-sector discrimination ban, and the remedial provisions associated with the latter ban confirm that its language prohibits retaliation.

issued implementing regulations providing that an employee's claim that he or she had suffered retaliation for complaining about unlawful discrimination could be treated as a "complaint of discrimination." See 37 Fed. Reg. 22,717, 22,723 (Oct. 21, 1972); *id.* at 22,717 (§ 713.262(a), added "to implement the [EEO Act]"). Thus, the CSC interpreted Title VII's federal-sector discrimination ban to prohibit retaliation against protected employees because they brought discrimination complaints. "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation" when it "adopts a new law incorporating sections of [the] prior law." *Lorillard*, 434 U.S. at 580. Accordingly, when it used the phrase "any discrimination based on age" in § 633a(a), Congress is properly presumed (1) to have known that the CSC had construed the materially identical language of Title VII's federal-sector discrimination ban to include reprisals as a form of prohibited "discrimination," and (2) to have incorporated this same meaning in § 633a(a).

That presumption is particularly powerful here. Before Congress extended Title VII's protections to federal workers, CSC regulations already barred discrimination in federal employment based on race, color, religion, sex, or national origin.[3] The major impetus behind the EEO Act of 1972 was Congress's belief that these regulations "were ineffective."

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[3] A series of Executive Orders dating back to at least 1948, *see* Exec. Order No. 9980, 13 Fed. Reg. 4311 (July 28, 1948), had set forth a policy of nondiscrimination in federal employment, and the CSC had, prior to 1972, issued regulations to implement this policy. *See* 5 C.F.R. § 713.201 *et seq.* (1968). As of 1971, these regulations were implementing the policy set forth in Executive Order 11478. *See* 34 Fed. Reg. 12,985 (Aug. 12, 1969).

Brown v. *GSA*, 425 U.S. at 826. "Congress found 'skepticism' among federal employees 'regarding the Commission's record in obtaining just resolutions of complaints and adequate remedies,'" which "'discouraged persons from filing complaints with the Commission.'" *Id.* at 825-26 (quoting S. Rep. No. 92-415, at 14 (1971)). These deficiencies led the House to pass a bill that would have transferred authority for preventing discrimination from the CSC to the Equal Employment Opportunity Commission ("EEOC"). See H.R. Rep. No. 92-238, at 56-57 (1971) (quoting § 717(e) of the House bill). The Senate also recognized the "defects" in the CSC's enforcement efforts, but chose to respond by *enhancing* the Commission's authority based on the "expectation that the Commission will take those further steps which are necessary in order to satisfy the goals of Executive Order 11478." S. Rep. No. 92-415, at 15. Ultimately, the House acceded to the Senate approach, and § 717(b) of the EEO Act empowered the CSC to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities." Pub. L. No. 92-261, 86 Stat. at 111-12. This authority is far broader than the EEOC's authority under the private employer provisions of Title VII to adopt "suitable procedural regulations." See 42 U.S.C. § 2000e-12(a).

Shortly after passage of the EEO Act, the CSC issued new regulations, which as just noted, included a provision treating reprisals against those who complain of prohibited discrimination as a form of the same prohibited discrimination. See 37 Fed. Reg. at 22,723. Less than 18 months later, Congress not only modeled § 633a(a) on Title VII's federal-sector discrimination ban, but gave the CSC precisely the same authority to enforce the new age-discrimination

ban that it had given the CSC to enforce Title VII's federal-sector ban. See Pub. L. No. 93-259, § 15(b), 88 Stat. at 75. It is implausible that, just two years after it scrutinized the CSC's efforts to prevent other types of employment discrimination and resolved a stark disagreement over how best to reform those efforts, Congress replicated the CSC's enhanced enforcement authority in the ADEA with no appreciation or awareness of how the Commission had exercised that authority under Title VII. This Court should assume that Congress knew and approved of how the CSC had exercised its authority under § 717(b) when Congress extended the ADEA to federal employment.

C. Section 633a(a)'s Purpose Confirms That Its Sweeping Antidiscrimination Mandate Bars Retaliation.

Section 633a(a)'s purpose also confirms that its sweeping discrimination ban prohibits retaliation against protected persons because they complain that they have been subjected to age discrimination. Both this Court and the government have consistently recognized that protection from retaliation is essential to any discrimination ban. Because Congress plainly shares this understanding, it necessarily expected that a provision requiring that "*[a]ll* personnel actions affecting" certain federal workers "shall be made free from *any* discrimination based on age" would prohibit retaliation against protected workers who complain that they have been subjected to age discrimination.

As this Court has recognized, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept" denials of their rights. *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

Retaliation "deter[s] victims of discrimination from complaining," *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997); restricts "access to statutory remedial mechanisms," *id.*, and thus "give[s] impetus to the perpetuation of [discrimination]," *Sullivan*, 396 U.S. at 237. Accordingly, where Congress relies on complaints from employees "to vindicate rights claimed to have been denied," effective enforcement can "only be expected if employees f[eel] free to approach officials with their grievances." *Mitchell*, 361 U.S. at 292.

The government itself has conceded that the objectives of an antidiscrimination provision "would be difficult, if not impossible, to achieve if persons who complain about . . . discrimination lacked adequate protection against retaliation." U.S. *Jackson* Br. at 5. Without such protection, "persons are likely to be reluctant to bring discrimination to light. And, absent a sufficient deterrent against retaliation, entities that are practicing discrimination . . . are likely to be emboldened to continue that discrimination." *Id.* at 13. See *Jackson*, 544 U.S. at 180 (endorsing this analysis).

Congress indisputably shares this understanding. No fewer than 43 federal statutes afford protection from retaliation to those who disclose violations of federal laws or exercise rights granted to them by federal law.[4] In virtually every instance where federal workers could require such protection—*i.e.*, where they could be the subject of retaliation—Congress has afforded them such protection.[5] Thus,

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[4] A list of these statutes is set forth in appendix A to this brief.

[5] A list of these statutes is set forth in appendix B to this brief.

Congress harbors no illusions that federal employers are different from private employers and will not retaliate against those who complain of wrongdoing. And Congress could not have believed that retaliation is less destructive of an age-discrimination ban than it is of prohibitions on other types of discrimination. Indeed, "[i]t is difficult to imagine how a workplace could be 'free from *any* discrimination based on age' if, in response to an age discrimination claim, a federal employer could fire or take other action that was adverse to an employee." *Forman*, 271 F.3d at 297.

Nor could Congress have thought such protection was unnecessary because it already existed. When § 633a(a) was adopted, CSC regulations authorized the processing of complaints of discrimination in federal employment based only on "race, color, religion, sex, or national origin," 5 C.F.R. § 713.211 (1974), and afforded complainants a remedy for reprisals only in connection with these types of discrimination complaints. *Id.* §§ 713.261-.262. As the government conceded below, "[a]ge discrimination in federal employment . . . was not barred by executive order or regulations prior to the 1970s, but was first prohibited when Congress expanded the ADEA to cover federal employees in 1974." *See* Br. for Appellee, at 5, *Gomez-Perez* v. *Potter*, No. 06-1614 (1st Cir. Aug. 14, 2006) ("U.S. Appeal Br."); see also 5 C.F.R. § 713.215 (1974) (complaint could be rejected if allegations of discrimination were "not within the purview of § 713.212").

It was only *after* the enactment of § 633a that the CSC added "[a] new Subpart E" to its antidiscrimination regulations "to carry out the policy of nondiscrimination based on age in [§ 633a]." 39 Fed. Reg. at 24,351. This new subpart provided that

age discrimination complaints would be governed by the same procedures and afforded the same protection from reprisal that had previously applied to complaints of other types of proscribed discrimination. See *id.* (under § 713.511, age discrimination complaints would be subject to requirements of § 713.213 through § 713.222 and § 713.261 through § 713.271). This post-enactment adoption of new regulations barring reprisals against those who complain of age discrimination confirms that Congress could not have thought that pre-ADEA mechanisms already provided such protection.

In particular, the adoption of these regulations belies the government's claim below that the anti-retaliation provision in the general administrative personnel regulations provided such protection prior to passage of § 633a. U.S. Appeal Br. at 20-21 (citing 5 C.F.R. § 771.211(a) (1965)). If the latter regulation had already barred reprisals for age-discrimination complaints, the CSC would not have needed to expressly incorporate such a prohibition in the new age-discrimination regulations. In fact, when § 633a was adopted, the general personnel regulations provided that discrimination claims were to be processed under the antidiscrimination regulations. See 5 C.F.R. § 771.216 (1974). Moreover, the general personnel regulations were far narrower than the antidiscrimination regulations. The former permitted appeals only of "adverse actions" (defined as removal, suspension of more than 30 days, unpaid furlough or a reduction in pay or grade), not all complaints of discrimination. Compare *id.* § 771.202(a), with *id.* §§ 713.211-.212. And, unlike the antidiscrimination regulations, the general personnel regulations provided only an "assur[ance]" against reprisals, but no remedy (unless the reprisal

took the form of another "adverse action"). Compare *id.* § 771.105(a)(1), with *id.* §§ 713.261-.262.[6]

In short, when Congress enacted § 633a, it plainly understood that protection from retaliation is indispensable to a prohibition on age discrimination in federal employment, and it had no reason to believe that federal workers already enjoyed such protection. Thus, its failure to include an express ban on retaliation in § 633a(a) necessarily reflects its view that the statute's comprehensive requirement that "*all* personnel actions affecting" covered older workers "shall be made free from *any* discrimination based on age" barred retaliation against protected workers who complain that they have been subjected to age discrimination. This is especially so given the background principles that would have informed its use of this language in 1974. By contrast, if Congress did not believe that the language it used would bar

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[6] The government also suggested that Congress would have thought protection against retaliation was unnecessary for postal workers because they were protected by the Postal Service Manual or collective bargaining agreements. U.S. Appeal Br. at 7-10. Given the lack of administrative protections against retaliation for all other federal workers, Congress would not have excluded retaliation from § 633a(a) simply because it believed postal workers were protected. In all events, there was no basis for such a belief. Virtually all of the limitations of the general personnel regulations were replicated in the Postal Service Manual, which permitted appeals only for the same set of "adverse actions" (except that suspensions of less than 30 days were included), and provided only an assurance of "freedom from . . . reprisal," without any remedy. U.S. Postal Serv., *Postal Service Manual*, pt. 444, §§ 241, 341 (Aug. 30, 1973). As for collective bargaining agreements, many postal workers were not covered by such agreements; there is no requirement that such agreements bar retaliation; and even when they do, the decision to grieve such complaints rests with the union, not the worker.

such retaliation, it inexplicably enacted a law that it knew would fail to achieve its goal. See U.S. *Jackson* Br. at 5 (objectives of an antidiscrimination provision "would be difficult, if not impossible, to achieve if persons who complain about . . . discrimination lacked adequate protection against retaliation"). Congress does not engage in such legislative futility.[7]

D. The Legislative History Confirms That Section 633a(a) Bars Retaliation.

In view of § 633a(a)'s sweeping and categorical ban, there is no need to consider its legislative history. That history, however, confirms that Congress intended to proscribe retaliation against protected persons who complain that they have been subjected to unlawful age discrimination.

Given the statute's purpose and the background understandings that informed Congress's use of § 633a(a)'s broad language, the legislative history is as revealing for what it does not say as for what it does. There are no statements in the legislative record suggesting that Congress affirmatively intended to deprive protected older workers of the type of protection from retaliation that Congress had included in dozens of other statutes, including those provisions of the ADEA that prohibit retaliation against private-sector employees who complain that they have been subjected to age discrimination. Tellingly, there is no mention of the CSC's general personnel regulations, the Postal Service Manual or

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[7] As petitioner demonstrates below, the ADEA's private-employer provisions do not justify the conclusion that Congress did so in the case of § 633a(a). Because the ADEA's private employer provisions proscribe age discrimination in narrower terms, Congress had to include an express ban on retaliation by private employers. *See infra* at § II.B.

any collective bargaining agreement, let alone any suggestion that members of Congress thought an "assurance" of freedom from reprisals set forth in such regulations or agreements would provide adequate protection against retaliation for complaints of age discrimination.

By contrast, there is ample evidence that Congress intended to extend to federal workers the same safeguards enjoyed by private-sector workers, who are protected from retaliation. See 29 U.S.C. § 623(d). The Senate Special Committee on Aging supported extending the ADEA to the federal sector because "it is difficult to see why one set of rules should apply to private industry and varying standards to government." See Special Committee on Aging, U.S. Senate, *Improving the Age Discrimination Law* 17 (Comm. Print 1973), *reprinted in* ADEA Leg. Hist. at 234. Similarly, the Senate Committee on Labor and Public Welfare endorsed extending the ADEA so that it could "remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment." S. Rep. No. 93-690, at 56 (1974), *reprinted in* ADEA Leg. Hist. at 252. And Senator Bentsen, the principal proponent of the 1974 amendments, explained that extending the ADEA to the federal sector would ensure that federal employees enjoy "the *same protections* against arbitrary employment based on age as . . . employees in the private sector," 120 Cong. Rec. 8768 (1974) (emphasis added), and that private employers would not be "subject to restrictions that are not applicable to the Federal Government," 120 Cong. Rec. 5741

(1974).[8] This repeatedly stated desire to ensure parity in the federal and private employment sectors confirms that Congress intended § 633a's sweeping language to provide the same protections from, and restrictions on, retaliation that apply in the private employment context.

E. Consistent And Binding Interpretations By The Responsible Agencies Confirm That Section 633a Bars Retaliation.

Although the text, background understanding and purpose of § 633a also make it unnecessary to rely on agency regulations or principles of deference to determine the statute's scope, the consistent and binding interpretations by the agencies charged with enforcing § 633a(a) confirm that it bars retaliation against protected workers because those workers complain that they have been subjected to age discrimination.

First, as noted above, the CSC was originally given the authority to issue rules and regulations necessary to enforce § 633a(a), Pub. L. No. 93-259, § 15(b), 88 Stat. at 75, and it responded by immediately adopting a new subpart that extended existing antidiscrimination regulations and requirements to age discrimination complaints. See 39 Fed. Reg. at 24,351 (under new § 713.511, age discrimination complaints would be subject to requirements of § 713.213 through § 713.222 and § 713.261 through § 713.271). One such regulation treated allegations of "reprisal in connection with the presentation of a complaint" of proscribed discrimination as "an individual complaint of discrimination." 5 C.F.R.

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[8] In construing the ADEA, this Court has given weight to the views of other sponsors. *See, e.g., Public Employees Ret. Sys.* v. *Betts*, 492 U.S. 158, 179 (1989).

§ 713.262(a) (1974). Thus, from the very first, the agency charged with enforcing § 633a(a) interpreted its categorical ban to prohibit retaliation against a protected person because that person brought a complaint alleging he had been subject to unlawful age discrimination.

Second, after the EEOC assumed enforcement authority for the ADEA in 1978,[9] it left these CSC regulations in place until 1992, when it issued regulations of its own.[10] These regulations likewise provided that it was "unlawful to restrain, interfere, coerce or discriminate against [a] complainant[] . . . because [he or she] filed a charge of discrimination," and that an allegation of such unlawful reprisal is reviewable "as an individual complaint of discrimination." 29 C.F.R. §§ 1613.261-.262(a) (1994). The current EEOC regulations similarly provide that "[c]omplaints alleging retaliation prohibited by these statutes [including the ADEA] are considered to be complaints of discrimination." 29 C.F.R. § 1614.103. And the EEOC Compliance Manual states that "[f]ederal employees are also

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[9] Enforcement authority was transferred from the CSC to the EEOC by Reorganization Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19,807, 19,807 (May 9, 1978).

[10] As noted earlier, the EEOC's authority to enforce the ADEA through "rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities," 29 U.S.C. § 633a(b), is much broader than its authority under the private-employer provisions of Title VII to adopt "suitable procedural regulations." 42 U.S.C. § 2000e-12(a). Thus, while the Court has interpreted the latter provision to exclude the power to make substantive interpretations of the statute, *see EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976), no such limitation is applicable to the EEOC's interpretive authority under § 633a(b).

protected against retaliation under each of the employment discrimination statutes." *EEOC Compliance Manual* § 8, at 8-1 n.5 (May 1998).[11]

* * * *

In sum, the plain language of § 633a(a), the background understandings that informed Congress's use of that language, the statute's purpose and legislative history, and the administrative interpretations of § 633a(a) all make clear that it bars the retaliation at issue in this case.

II. THE FIRST CIRCUIT'S CONTRARY INTERPRETATION OF SECTION 633a(a) IS ERRONEOUS.

In the decision below, the First Circuit offered a series of reasons why this Court's decision in *Jackson* does not dictate the proper interpretation of § 633a(a)'s broad language, and why the D.C. Circuit's interpretation of that language should not be followed. All of these reasons are mistaken.

A. The First Circuit Failed To Analyze The Text Of § 633a(a) Properly.

The First Circuit began its analysis of § 633a(a)'s text by improperly assuming the answer to the question raised by this case. It reasoned that § 633a(a) "clearly prohibits" discrimination based on age, "but says nothing that indicates that Congress

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[11] Although the Postal Service does not possess the same authority as the EEOC to enforce § 633a(a), and its regulations implementing that provision are thus not entitled to *Chevron* deference, it is noteworthy that the Service itself has issued regulations acknowledging that § 633a(a) "forbid[s] reprisal for participating in protected EEO activity." U.S. Postal Serv., *Employee Labor Relations Manual* § 672.1(d) (June 2007).

meant for this provision to provide a cause of action for retaliation for filing an age-discrimination related complaint." Pet. App. 5a. After *Jackson*, however, it is not possible to conclude that a sweeping prohibition on discrimination based on protected status "says nothing" about retaliation. Rather than grapple with *Jackson*'s textual analysis, the court of appeals brushed the decision aside, reasoning that *Jackson* is distinguishable on a variety of grounds. None of the lower court's purported distinctions, however, withstands scrutiny.

First, the court of appeals found it significant that "in *Jackson*, the Court was interpreting a judicially-created cause of action that was implied from Title IX," and that "[t]he Court is the primary entity involved in defining the contours of that right of action." Pet. App. 6a (internal quotation marks and alterations in original omitted). Here, however, "Congress explicitly created a statutory cause of action in § 633a, but did not include retaliation in that cause of action." *Id.* This reasoning is doubly flawed.

As just noted, it once again assumes the answer to the critical question—*i.e.*, whether § 633a(a)'s comprehensive and unqualified discrimination ban prohibits retaliation against older workers because they seek to vindicate their right to be free from age discrimination. More fundamentally, the lower court's distinction rests on the erroneous notion that the scope of a statute's substantive prohibition depends on whether the cause of action for its enforcement is express or implied. While implication of a private right of action is an exercise of law-making power in the sense that the Court creates the right "to invoke the power of the court" to enforce that right, *Davis* v. *Passman*, 442 U.S. 228, 239 n.18

(1979) (defining a "cause of action"), the scope of the substantive right enforced in a judicially-created cause of action is still defined by the statute itself. Determining the scope of that substantive right is thus an exercise in statutory interpretation—not an exercise of the judiciary's limited lawmaking power.

Accordingly, the Court explained in *Jackson* that, in "all of" the cases in which it has determined the scope of Title IX's prohibition, it "relied on the text of Title IX." 544 U.S. at 173. And that is what the Court did in *Jackson*.[12] Thus, any distinction between § 633a(a) and Title IX must rest on the *language* that defines the statutes' substantive prohibitions, not on the express or implied nature of the causes of action that can be invoked to enforce those prohibitions. The lower court did not, because it could not, identify any basis for concluding that a statute prohibiting "discrimination" "on the basis of" a protected status bars retaliation against those who complain of the proscribed discrimination, while a statute that requires "all personnel actions" to be made "free from any discrimination based on" protected status does not.

Second, the court of appeals sought to distinguish *Jackson* on the ground that it was premised, in part, on the fact that "a retaliation cause of action would protect 'teachers and coaches,' who themselves were not the targets of discrimination, but who 'are often

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[12] *See* 544 U.S. at 175 (by using the broad term "discrimination," "*Congress* gave the statute a broad reach") (emphasis added); *id.* ("Courts must accord Title IX a sweep as broad as its *language*") (emphasis added; internal quotation marks omitted). *id.* at 178 ("We reach this result based on the *statute's text*") (emphasis added); *id.* at 178 n.2 ("We interpret *Title IX's text* to clearly prohibit retaliation for complaints about sex discrimination") (emphasis added).

in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators.'" Pet. App. 6a-7a (quoting *Jackson*, 544 U.S. at 181). This rationale, the First Circuit concluded, does not apply here, because "employees such as Gómez can hardly argue that their co-workers are often in the best position to identify instances of age discrimination and bring it to the attention of supervisors." *Id.* at 7a.

This purported distinction is demonstrably incorrect. *Jackson*'s discussion of the ability of teachers and coaches to identify and report discrimination against others was addressed to a *separate holding* that is irrelevant here. In *Jackson*, the school board argued that, even if Title IX barred retaliation, that prohibition could not be invoked by a third party, such as a male coach, who was not the "victim of the discrimination that [was] the subject of the original complaint." 544 U.S. at 179. The Court rejected this argument, concluding that such third-party actions were essential to achievement of the statute's purpose because third parties were often in the best position to identify and report discrimination against students. *Id.* at 180.

This discussion thus addressed the issue of *who* may bring a retaliation claim, not whether retaliation is actionable at all. In concluding that retaliation is actionable under Title IX, the Court did not rely on the need for third-party complaints, but instead found that Title IX's proscription of "discrimination" "on the basis of sex" prohibited retaliation. *Id.* at 173-74. This textual analysis is fully applicable to § 633a(a)'s even broader language. Indeed, the question whether a third party can bring an action for retaliation under § 633a is not presented because,

unlike the complainant in *Jackson*, petitioner is a member of the protected class and was the victim of the discrimination that was the subject of the original complaint.

Third, the lower court believed that *Jackson* had relied on the fact that Title IX was adopted "in response to the Court's holding in *Sullivan* . . . in which the Court upheld a cause of action for retaliating for speaking out against race discrimination." Pet. App. 7a (citation omitted). The First Circuit concluded that here, by contrast, "there is no evidence in the legislative history that the ADEA's federal sector provisions were adopted in a similar context of claims by federal employees for retaliation for speaking out against age discrimination." *Id.* Contrary to the lower court's belief, however, this Court did not say in *Jackson* that Title IX was adopted "in response to" *Sullivan*, but rather that it was realistic to presume that the 1972 Congress was aware of the *Sullivan* decision. *Jackson*, 544 U.S. at 176 (because Title IX was enacted three years prior to *Sullivan*, "that decision provides a valuable context for understanding" Title IX). As petitioner has shown, *supra* at § I.B.1, it is realistic to presume that the 1974 Congress was equally familiar with *Sullivan*, and expected the term "discrimination" in § 633a(a) to be interpreted in the same broad manner that the Court had construed 42 U.S.C. § 1982 in *Sullivan*.[13]

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[13] There is no merit to the suggestion that, "because *Sullivan*, like *Jackson*, interpreted the scope of an implied right of action, it cannot be presumed that Congress was seeking to incorporate *Sullivan*'s holding when it enacted" § 633a(a). Br. for the Resp. in Opp. at 11. *Sullivan* did not interpret "the scope of an implied right of action," but rather "a general prohibition on racial discrimination" in the *text* of 42 U.S.C. § 1982. *Jackson*,

B. The First Circuit's Structural Analysis Of The ADEA Is Mistaken.

The First Circuit believed two other provisions of the ADEA buttressed its reading of § 633a(a). First, it reasoned that, because § 623(d) prohibits retaliatory discrimination by private employers,[14] "[t]he absence of statutory language providing a claim for retaliation in § 633a, when compared with the explicit prohibition on retaliation in § 623(d), further supports the conclusion that Congress intended for the ADEA to prohibit retaliation by private employers, but not by federal employers." Pet. App. 8a. In addition, the First Circuit believed that § 633a(f), which provides that the ADEA's private sector provisions do not apply to federal employers, 29 U.S.C. § 633a(f), confirmed that Congress did not want the "expansive private-sector provisions of the ADEA extended to federal employees." Pet. App. 9a-10a. Both conclusions are wrong.

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544 U.S. at 176. In *Jackson*, this Court presumed the 1972 Congress was aware of this ruling when it banned "discrimination" "on the basis of sex" in Title IX, and it is equally reasonable to presume that Congress was aware of this ruling when it used the even broader language of § 633a(a) just two years later. The presumption, in other words, concerns how Congress expected this Court to interpret a *substantive prohibition*; the manner in which that prohibition is judicially enforced (*i.e.*, through an implied or express cause of action) has no bearing on whether Congress expected the word "discrimination" to be construed to encompass retaliation.

[14] Section 623(d) provides that

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d).

1. Section 623(d) of the ADEA does not demonstrate that Congress intended to leave federal employees with no protection from retaliation.

In *Jackson*, both the government and this Court rejected the very same type of apples-to-oranges comparison that the lower court used to narrow the scope of § 633a(a)'s sweeping and comprehensive prohibition. The court of appeals in *Jackson* had relied on § 704(a) of Title VII to conclude that Title IX's broadly worded prohibition did not proscribe retaliation against those who oppose discrimination against women, reasoning that, "when Congress wished to prohibit retaliation against individuals who complain about . . . discrimination . . . it did so explicitly." *Jackson* v. *Birmingham Bd. of Educ.*, 309 F.3d 1333, 1344 n.12 (11th Cir. 2002) (citation omitted). In this Court, the government criticized this reasoning. It noted that Title VII's proscription of retaliation "is one in a series of prohibitions against discrimination in employment that specify in great detail the kind of discrimination prohibited," whereas Title IX's prohibition against discrimination "is contained in a single general prohibition." U.S. *Jackson* Br. at 21.

> The appropriate comparison for Title IX is therefore not Title VII, but 42 U.S.C. 1982 and Title VI, both of which contain a single general prohibition against discrimination, and both of which had been authoritatively construed to encompass protection against retaliation before Title IX was enacted.

Id.

This Court endorsed this reasoning. Noting the difference between Title IX's "broadly written general

prohibition on discrimination," and Title VII's detailed specification of proscribed conduct, the Court concluded that no negative inference could be drawn from a comparison of such disparate provisions. *Jackson*, 544 U.S. at 175. "Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." *Id.*

This reasoning is fully applicable here. Just as Title VII's private-sector provisions provided no basis for narrowing Title IX's broad prohibition, the ADEA private-employer provisions, which "were derived *in haec verba* from" Title VII's private-employer provisions, *Lorillard*, 434 U.S. at 584, provide no basis for narrowing § 633a(a)'s even broader, stand-alone prohibition. Where Congress lists a series of discrete types of prohibited conduct, as it did in the private-employer provisions of Title VII and the ADEA, and fails to mention one such type of conduct, it is reasonable to infer that the omission was intentional. But the fact that Congress included retaliation in the ADEA's list of discrete types of unlawful private-sector conduct does not demonstrate that reprisals fall outside the scope of § 633a(a)'s fundamentally different prohibition, which does not specify *any* proscribed acts and instead requires that "*[a]ll* personnel actions . . . shall be made free from *any discrimination*." Indeed, *Jackson* ratified the very reasoning the D.C. Circuit employed in concluding that § 623(d) provided no basis for narrowing the reach of § 633a(a). See *Forman*, 271 F.3d at 296 ("Unlike § 623, which is narrowly drawn and sets forth specific prohibited forms of age discrimination in private employment, Congress used

sweeping language when it subsequently extended the ADEA to cover federal agency employees.").[15]

The First Circuit also wrongly believed that its "negative inference" theory was supported by the decision in *Lehman*, Pet. App. 9a. In that case, this Court held that § 633a(c) did not afford federal employees the same right to a jury trial that private employees have under the ADEA. Critically, however, in *Lehman*, this Court compared § 15(c) of the ADEA's federal-sector provision (§ 633a(c)) with § 7(c) of the private-employer provisions (§ 626(c)). Except for the right to a jury trial (and a proviso concerning the impact of EEOC suits), these two provisions are *identical*, unlike the fundamentally different private- and federal-employer provisions of the ADEA. Indeed, this Court emphasized that its conclusion that the federal-sector provision did not

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[15] This same reasoning underscores the impropriety of the First Circuit's reliance on *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). *See* Pet. App. 5a. In examining Title VII's *private employer* provisions, the Court observed that § 703(a) (which it designated the "core antidiscrimination provision") seeks to prevent injury to individuals "based on who they are, *i.e.*, their status," while § 704(a) (which it labeled Title VII's "anti-retaliation provision") "seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." 126 S. Ct. at 2411-12. Contrary to the First Circuit's view, however, this is plainly not a ruling that "discrimination" and "retaliation" are, as a matter of law, distinct and mutually exclusive wrongs. The Court's observation was simply descriptive of Title VII's differently worded, and differently structured, private-employer provisions, which, as this Court explained just the year before in *Jackson*, set forth a series of narrow prohibitions, and provide no basis for narrowing a broadly worded, stand-alone antidiscrimination provision. Thus, *Burlington* does not repudiate *Jackson*'s reasoning, let alone overrule its holding without hinting it was doing so.

confer a right to jury trial was the direct result of the fact that, "[w]ith the exception of the express right to jury trial conferred by § 7(c)(2) and of the proviso in § 7(c)(1), *§ 7(c) is identical to § 15(c).*" *Lehman*, 453 U.S. at 158 n.6 (emphasis added). It was the disparity in otherwise identical provisions that demonstrated that Congress did not intend to authorize jury trials in cases involving federal employers. *Id.* at 162-63. Thus, *Lehman* involved precisely the type of apples-to-apples comparison that can give rise to a negative inference—and that cannot be made in the case of the differently-structured § 623 and § 633a(a).

The logical fallacy in the court of appeals' "negative inference" theory is illustrated by § 623(e), which prohibits discriminatory advertisements and notices for private employment. See 29 U.S.C. § 623(e). Under the lower court's theory, the lack of such an express prohibition in § 633a(a) means that it does not bar the use of discriminatory notices or advertisements. But § 633a(a) plainly *does* prohibit such practices: they are "personnel actions" that (1) "affect[] . . . applicants for employment" over 40 and (2) are not "free from any discrimination based on age." *Id.* § 633a(a). And, because a ban on discriminatory advertising is superfluous in light of § 633a(a)'s broad scope, it would be improper to conclude that the inclusion of such an express prohibition in the ADEA's private employer provisions but not in § 633a(a) somehow limits the scope of § 633a(a). The same is true for retaliation, which is also encompassed by the comprehensive and unqualified language of § 633a(a).

2. Section 633a(f) provides no support for the conclusion that Congress intended to leave federal employees with no protection from retaliation.

The First Circuit's reliance on § 633a(f) is equally misplaced. This provision states that any personnel action covered by § 633a(a) "shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section." *Id.* § 633a(f).[16] This provision does not limit § 633a(a)'s broad prohibition, or demonstrate that it is narrower in scope than § 623. In fact, its purpose is just the opposite: to ensure that limitations and restrictions found in the ADEA's private-sector provisions are not incorporated into the federal-sector provision.

Contrary to the First Circuit's view, construing § 633a(a)'s broad language to prohibit retaliation against protected older workers because they complain of being subjected to age discrimination does not extend the private-sector provisions of the ADEA to federal employees. Pet. App. 10a. Such an interpretation simply enforces the broad prohibition found in the plain language of § 633a(a) itself. The flaw in the First Circuit's contrary reasoning can once again be illustrated by considering § 623(e). As just noted, § 633a(a)'s plain language prohibits the same types of discriminatory advertising that § 623(e) bans. This does not mean that federal personnel actions are "subject to, or affected by," § 623(e). It simply means that § 633a(a)'s sweeping language proscribes the same types of conduct by federal

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[16] Section 631(b) limits the protections of § 633a to "individuals who are at least 40 years of age." 29 U.S.C. § 631(b).

employers that the various subsections of § 623 make unlawful for private employers.

Nor is it true that according § 633a(a) its plain meaning renders § 633a(f) "surplusage." Pet. App. 9a. The latter provision ensures, for example, that certain defenses available to private employers, see 29 U.S.C. § 623(f), do not apply in a federal age discrimination case. Similarly, it ensured that the permissible mandatory retirement age of 70 that applied in the private sector in 1978 (when § 633a(f) was adopted) would not apply to the federal sector. See Pub. L. No. 95-256, §§ 3, 5, 92 Stat. at 189, 192.[17]

In fact, Congress adopted § 633a(f) for these very reasons. The House Report accompanying the provision explained that § 633a(a) "is complete in itself. Restrictions and limitations in other parts of the act, such as paragraph (a) of section 12 [former § 631, which set forth the upper age limit] and paragraph (f) of section 4 [§ 623(f), which sets forth statutory defenses available to private employers] do not apply to section 15 [§ 633a(a)]." H.R. Rep. No. 95-527, pt. 1, at 11 (1977), *reprinted in* ADEA Leg. Hist., at 371. Thus, § 633a(f) had, and still has, independent meaning and purpose when the broad and sweeping language of § 633a(a) is given its full scope. Indeed, § 633a(f)'s purpose was to ensure that the breadth of the federal age-discrimination ban is not narrowed by any of the ADEA's private-sector provisions. The First Circuit's reliance on § 633a(f), therefore, completely frustrated its purpose.

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[17] Congress removed the upper age limit for the private sector in 1986. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2, 100 Stat. 3342, 3342.

III. SOVEREIGN IMMUNITY PRINCIPLES PROVIDE NO BASIS FOR NARROWING SECTION 633a(a)'s BROAD LANGUAGE.

Finally, the government argued below that principles of sovereign immunity require that § 633a(a) be narrowly construed. But, as the First Circuit correctly ruled, sovereign immunity is irrelevant here, because Congress waived the Postal Service's immunity to suits such as this. Indeed, even if the rule of strict construction that governs waivers of sovereign immunity applied here, § 633a(a)'s sweeping language clearly waives the government's immunity to retaliation claims. The government's reliance on that rule of construction, however, reflects an unwarranted attempt to expand sovereign immunity principles: the strict construction rule applies to the government's amenability to suit and the incidents and relief available when it is amenable to suit, not to the substantive norms that become judicially enforceable as a result of the waiver.

A. Sovereign Immunity Principles Are Inapplicable To Section 633a(a).

The Postal Reorganization Act "waives the immunity of the Postal Service from suit by giving it the power 'to sue and be sued' in its official name." *United States Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744 (2004) (quoting 39 U.S.C. § 401(1)). This Court has ruled that the "absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity." *Id.* at 744 (citing *FDIC* v. *Meyer*, 510 U.S. 471 (1994)). But there is no dispute that the substantive law here applies to the Postal Service: § 633a(a) expressly bars any age discrimination in personnel actions affecting employees "in the United

States Postal Service." 29 U.S.C. § 633a(a). See also *Loeffler* v. *Frank*, 486 U.S. 549, 558-61 (1988) (essentially identical language of § 717(a) of Title VII satisfies *Meyer*'s second step as to Postal Service). Accordingly, principles of sovereign immunity are wholly inapposite here. Indeed, because Congress waived the Postal Service's immunity against a longstanding background rule that "sue-and-be-sued" clauses are construed broadly, *FHA* v. *Burr*, 309 U.S. 242, 245 (1940), and made clear that the Service is subject to § 633a(a)'s substantive prohibition, Congress plainly did not intend courts to narrow that prohibition in suits involving the Postal Service based on sovereign immunity concerns.

Nevertheless, the government argued below that, because § 633a(a)'s substantive ban applies to other federal employers, it must "be narrowly construed irrespective of the Postal Service's status as a federal entity that may sue and be sued." U.S. Appeal Br. at 45-46. And, according to the government, § 633a(a) does not proscribe retaliation with the clarity necessary to waive sovereign immunity. Neither of the premises to this argument is correct.

B. Even If Immunity Principles Apply, Section 633a(a) Provides The Necessary Clear Statement.

If sovereign immunity principles were applicable to § 633a(a)'s substantive norm, the plain language of the statute would clearly and unambiguously waive immunity for claims of retaliation.

The D.C. Circuit reached precisely this conclusion in *Forman*, explaining that the "sweeping," "unqualified," and "comprehensive" language of § 633a(a) provided the "unequivocal[ ] express[ion]" of intent necessary to waive sovereign immunity for

retaliation claims. 271 F.3d at 296-97. This Court effectively ratified that conclusion in *Jackson*. It found that Title IX's prohibition on "discrimination" "on the basis of sex"—which is less sweeping than § 633a(a)'s age discrimination ban—was sufficiently clear to satisfy a "clear statement" rule no less stringent than that governing waivers of sovereign immunity. See *Jackson*, 544 U.S. at 184 (Thomas, J., dissenting) (noting that Congress must "speak unambiguously in imposing conditions on funding recipients through its spending power"). In fact, *Jackson* repeatedly stated that Title IX's text *clearly* barred retaliation against individuals because they complain about proscribed discrimination.[18] Moreover, as petitioner has shown, the language of § 633a(a) is even clearer, since it requires that "*[a]ll* personnel actions affecting" protected federal workers "shall be made free from *any* discrimination based on age," 29 U.S.C. § 633a(a) (emphases added), and the retaliation here falls even more squarely within the discrimination ban than the conduct at issue in *Jackson* did.

Indeed, the clarity of the text is confirmed by the background principles that informed Congress's use of the phrase "discrimination based on" age. As petitioner has shown, Congress is properly presumed to have expected, when it legislated in 1974, that this phrase would capture retaliation against those who complain of being subjected to discrimination. See

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[18] *See* 544 U.S. at 178 n.2 ("We interpret Title IX's text to *clearly* prohibit retaliation for complaints about sex discrimination") (emphasis added); *id.* at 182 (retaliation "*clearly* violate[s] Title IX") (emphasis added); *id.* at 183 (retaliation "violates the *clear terms of the statute*") (emphasis added; internal quotation marks omitted).

supra § I.B.[19] In light of these background understandings, the language Congress chose to use in § 633a(a) reflects an unequivocal expression of its intent to permit suits for such retaliation. See U.S. *Jackson* Br. at 11-12 (in light of *Sullivan* alone, Congress "would have seen no need to enact a prohibition that specifically referred to retaliation").

C. In Seeking To Narrow Section 633a(a)'s Substantive Norm, The Government Seeks An Unwarranted Expansion Of The Rule Of Strict Construction.

Section 633a(a) satisfies the clear statement requirement for waivers of sovereign immunity, but that requirement does not apply for yet another reason. Use the rule of strict construction here would work an unwarranted expansion of this interpretive principle. Sovereign immunity applies to the federal government's amenability to suit, the conditions governing its amenability to suit,[20] and the relief available in such suits.[21] The rule of strict

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[19] Use of such background principles is consistent with the rule that the unequivocal intent to waive immunity must appear in statutory text. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992). Deriving Congress's understanding of the terms it used from contemporaneous usage in judicial and regulatory interpretations and related statutes is no different than deriving that understanding from contemporaneous dictionaries. *See, e.g., Utah* v. *Evans*, 536 U.S. 452, 475 (2002) (deriving meaning of "enumeration" from contemporaneous dictionaries); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 759 (1980) (in construing a word in a statute, "we may look to the contemporaneous understanding of the term").

[20] *See Lehman*, 453 U.S. at 162-69 (waiver in ADEA conditioned on lack of right to jury trial).

[21] *See Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262-63 (1999) (waiver in § 702 of the Administrative Procdure

construction, therefore, applies to those aspects of a statute that govern these subjects.[22]

The substantive norm set forth in § 633a(a), however, involves none of these subjects. It is a rule of conduct that governs covered personnel actions year in and year out, regardless of whether any federal entity is sued for violating that norm. What the government seeks, therefore, is an improper "double-narrowing" of § 633a—the use of sovereign immunity principles to limit not only the types of relief and the incidents of suit available under subsection (c), but also the substantive protection afforded by subsection (a). This Court has rejected this type of "double-narrowing" elsewhere. See *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (a statute gives rise to claim within the Indian Tucker Act's waiver of sovereign immunity if "it 'can fairly be interpreted as mandating compensation by the Federal government,'" a standard that requires "a showing demonstrably lower than the standard for the initial

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Act does not extend to claims for money damages, including claims to enforce equitable liens, which are simply a type of substitute remedy like money damages); *Lane* v. *Pena*, 518 U.S. 187, 192-94 (1996) (Rehabilitation Act does not waive immunity for monetary damages).

[22] *See Lehman*, 453 U.S. at 160-65 (applying rules of strict construction to subsection (c) of § 633a in determining that federal employees are not entitled to a jury trial); *Nowd* v. *Rubin*, 76 F.3d 25, 27 (1st Cir. 1996) (strictly construing subsection (c) of § 633a in concluding that it does not waive immunity for attorneys' fees); *Villescas* v. *Abraham*, 311 F.3d 1253, 1256-59 (10th Cir. 2002) (applying rules of strict construction in holding that subsection (c) of § 633a does not waive immunity for compensatory damages for emotional distress).

waiver of sovereign immunity" itself). The Court should reject that approach here as well.

Indeed, the "double-narrowing" the government seeks would lead to untenable anomalies. The ADEA grants the EEOC precisely the type of broad rule-making and interpretive powers that, under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), allow the agency to speak with the force of law when addressing ambiguities in the statute, or issues as to which the statute is silent. See 29 U.S.C. § 633a(b) (authorizing the EEOC "to enforce the provisions of subsection (a)" and empowering it to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities"). But, if sovereign immunity principles apply to the substantive norm, this interpretive authority is illusory. The agency can enforce only those prohibitions clearly stated in the text of subsection (a). If that text is silent or ambiguous, the agency cannot exercise its lawmaking power, lest it expand the scope of the waiver.[23]

Moreover, applying rules of strict construction to § 633a(a)'s substantive prohibition is inconsistent with Congress's intent here. As noted above, § 633a(a) was modeled on § 717(a) of Title VII, which replaced a regulatory ban on discrimination based on race, color, religion, sex, or national origin. Compare

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[23] In fact, the government has recognized that sovereign immunity principles do not apply to § 633a(a)'s substantive norm for this very reason. In *Villescas*, the government argued that sovereign immunity barred the relief of compensatory damages for emotional distress, but it "accept[ed] the existence of such a cause of action [*i.e.*, for retaliation] pursuant to regulations issued by the EEOC." 311 F.3d at 1258.

5 C.F.R. § 713.201 *et seq.* (1968), with EEO Act, Pub. L. No. 92-261, § 717(a), 86 Stat. at 111 (codified at 42 U.S.C. §§ 2000e-16(a)). Section 717(c) subjected the government to suit for various forms of relief for violations of the statutory ban, and the government's amenability to such suit is subject to the rule of strict construction. See, *e.g.*, *Library of Congress* v. *Shaw*, 478 U.S. 310, 323 (1986) (Title VII does not waive the United States' immunity for interest), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. But Congress could not have intended the substantive ban of § 717(a) itself to be strictly construed. To the contrary, Congress adopted that ban because it believed the pre-existing regulatory prohibition had been "ineffective." *Brown* v. *GSA*, 425 U.S. at 826. Yet, under the government's "double-narrowing" approach, Title VII's statutory ban would have to be interpreted more strictly than the ineffective regulatory ban it was designed to replace. Because it would be improper to use sovereign immunity principles to narrow the scope of § 717(a) of Title VII, it is equally improper to use those principles to narrow the protections of § 633a(a), which Congress modeled on § 717(a).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the decision below be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

FEDERAL STATUTES CONTAINING ANTI-RETALIATION PROVISIONS

2 U.S.C. § 1317(a)	(various rights of congressional employees)
3 U.S.C. § 417(a)	(various rights of certain employees in the office of the President)
5 U.S.C. § 7116	(unfair labor practices by federal agencies)
10 U.S.C. § 2409(a)	(reporting violations of the law by federal contractors)
12 U.S.C. § 1441a(q)(1)	(reporting possible violations of the law to the Thrift Depositor Protection Oversight Board)
12 U.S.C. § 1790b	(reporting possible violations of the law by credit unions or supervising federal officials)
12 U.S.C. § 1831j	(reporting possible violations of the law or gross mismanagement by banks or federal agencies overseeing banks)
15 U.S.C. § 2622	(control of toxic substances)
15 U.S.C. § 2651(a)	(asbestos hazard)

18 U.S.C. § 1514A	(employees of publicly traded corporations who disclose information to the SEC, Members of Congress, or federal regulatory agencies)
20 U.S.C. § 3608	(disclosure of asbestos hazard in school)
20 U.S.C. § 4018	(disclosure of asbestos hazard in school)
22 U.S.C. § 4115	(rights of Department of State employees to join, or refrain from joining, union)
29 U.S.C. § 158(a)(3)-(4)	(National Labor Relations Act)
29 U.S.C. § 215(a)(3)	(Fair Labor Standards Act)
29 U.S.C. § 623(d)	(Age Discrimination in Employment Act)
29 U.S.C. § 660(c)(1)	(Occupational Safety and Health Act)
29 U.S.C. § 1140	(ERISA)
29 U.S.C. § 1855(a)	(Migrant and Seasonal Agricultural Worker Protection Act)
29 U.S.C. § 2002	(Employee Polygraph Protection Act)
29 U.S.C. § 2615(a)	(Family and Medical Leave Act)
30 U.S.C. § 815(c)(1)	(mine safety)
30 U.S.C. § 1293(a)	(surface mining control and reclamation)

31 U.S.C. § 3730(h)	(false claims against the United States)
31 U.S.C. § 5328(a)	(disclosure to federal officials of violations of laws regarding reports of monetary transactions)
33 U.S.C. § 948a	(longshore and harbor workers' compensation)
33 U.S.C. § 1367(a)	(water pollution prevention and control)
38 U.S.C. § 4311(b)	(rights of members of the armed services to reemployment)
41 U.S.C. § 265(a)	(violations of the law by federal contractors)
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42 U.S.C. § 9610(a)	(CERCLA)
42 U.S.C. § 12203(a)	(Americans with Disabilities Act)
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49 U.S.C. § 31105(a)	(commercial motor vehicle safety)

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49 U.S.C. § 60129(a)	(pipeline safety)
50 U.S.C. § 2702(c), (i)	(whistleblowing related to military atomic energy facilities)

APPENDIX B

FEDERAL STATUTES CONTAINING ANTI-RETALIATION PROVISIONS THAT COVER FEDERAL EMPLOYEES

2 U.S.C. § 1317(a)	(various rights of congressional employees)
3 U.S.C. § 417(a)	(various rights of certain employees in the office of the President)
5 U.S.C. § 7116	(unfair labor practices by federal agencies)
12 U.S.C. § 1441a(q)(1)	(reporting possible violations of the law to the Thrift Depositor Protection Oversight Board)
12 U.S.C. § 1790b	(reporting possible violations of the law by credit unions or supervising federal officials)
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15 U.S.C. § 2622	(control of toxic substances)
22 U.S.C. § 4115	(rights of Department of State employees to join, or refrain from joining, union)
29 U.S.C. § 215(a)(3)	(Fair Labor Standards Act)
29 U.S.C. § 2615(a)	(Family and Medical Leave Act)

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50 U.S.C. § 2702(c), (i)	(whistleblowing related to military atomic energy facilities)

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No. 06-1321

In the Supreme Court of the United States

MYRNA GOMEZ-PEREZ, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a(a), permits a federal employee to sue her employing agency for alleged retaliation under the Act.

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In the Supreme Court of the United States

No. 06-1321

MYRNA GOMEZ-PEREZ, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

1. a. Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA or the Act), 29 U.S.C. 621 *et seq.*, with two principal provisions governing the conduct of *private* employers in 29 U.S.C. 623. Section 623(a)(1) makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). Separately, Section 623(d) establishes an anti-retaliation provision, which makes it unlawful for an employer to "discriminate against any of his employees or applicants for employment * * * because such individual * * * has opposed any practice made unlawful by this section, or because such individual * * * has made a charge, testified, assisted, or participated in any manner in an

investigation, proceeding, or litigation under [the Act]." 29 U.S.C. 623(d).

Because the ADEA's 1967 definition of "employer" did "not include the United States * * * or a State or political subdivision thereof," ADEA, Pub. L. No. 90-202, § 11(b), 81 Stat. 605, the Act applied only to the private-employment context until 1974. In that year, Congress amended the ADEA in two ways to provide statutory protections for public-sector employees. First, Congress extended Section 623's existing anti-discrimination and anti-retaliation provisions to state employers by revising the Act's definition of "employer" to include "a State or a political subdivision of a State." See Fair Labor Standards Amendments of 1974 (FLSA Amendments), Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (amending 29 U.S.C. 630(b)).

Second, the 1974 amendments added 29 U.S.C. 633a to the Act to establish a self-contained provision governing federal-sector employment, rather than simply extending the private-sector provision to federal agencies as Congress did for the states. FLSA Amendments § 28(b)(2), 88 Stat. 74. Section 633a(a) provides that, in specified federal agencies, including the United States Postal Service (USPS):

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age * * * shall be made free from any discrimination based on age.

29 U.S.C. 633a(a).

In Section 633a(b), Congress also directed the Civil Service Commission (CSC)—and later, the Equal Employment Opportunity Commission (EEOC)—"to enforce the provisions of subsection (a) through appropri-

ate remedies," to process and take final action on "complaints of discrimination in Federal employment on account of age," and to "issue such rules, regulations, orders, and instructions it deems necessary and appropriate to carry out its responsibilities under [Section 633a]." FLSA Amendments § 28(b)(2), 88 Stat. 75 (enacting 29 U.S.C. 633a(b)). In addition, in Section 633a(c), Congress further authorized aggrieved persons who either have filed an equal employment opportunity (EEO) "complaint concerning age discrimination with the Commission" or have given notice of their intent to sue to bring a civil action in district court for "such legal and equitable relief as will effectuate the purposes of [the Act]." 29 U.S.C. 633a(c) and (d).

In 1978, Congress further revised the ADEA and enacted the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 2301 *et seq.*, with provisions supplementing the ADEA's prohibition on age discrimination in federal employment. First, Congress added subsection (f) to Section 633a of the ADEA, providing that "[a]ny personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of [the ADEA], other than the provisions of section 631(b) of this title and the provisions of this section."[1] 29 U.S.C. 633a(f).

The CSRA, in turn, codified a series of "prohibited personnel practices" in executive agencies. 5 U.S.C. 2302(a)(1), (2)(C) and (b). As is relevant here, the CSRA states that federal employees with authority concerning

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[1] Section 631(b) states that, "[i]n the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age." 29 U.S.C. 631(b).

any "personnel action" shall not, in exercising that authority, "take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of * * * the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation" or the employee's "testifying for or otherwise assisting any individual in the exercise of any [such] right." 5 U.S.C. 2302(b)(9).

b. Many USPS employees are excepted from the CSRA and are covered instead by collective-bargaining agreements or a personnel system developed by the USPS. 39 U.S.C. 410(a), 1001, 1206(b), 1209(a). In authorizing those alternative personnel systems, Congress required the USPS to "assure its officers and employees * * * full protection of their employment rights by guaranteeing them an opportunity for a fair hearing on adverse actions." 39 U.S.C. 1001(b).

The USPS personnel system accordingly prohibits "any action, event, or course of conduct that * * * subjects any person to reprisal for prior involvement in EEO activity." USPS, *Employee and Labor Relations Manual* § 665.23, at 681-682 (June 2007) (*ELM*) <http://www.usps.com/cpim/manuals/elm/elm.htm>. All collective-bargaining agreements incorporate that prohibition against retaliation and prohibit discipline that is either "punitive" or not "for just cause." See *Agreement Between the USPS and the National Postal Mail Handlers Union* arts. 16.1, 19.1 (2000) (*Mail Handlers Agreement*) <http://www.npmhu.org/Resource/Agreement/USPSNPMHU2000NationalAgreement.pdf>; American Postal Workers Union, AFL-CIO & USPS, *National Collective Bargaining Agreement* arts. 16.1, 19 (July 19, 2007) (*National Agreement*) <http://www.apwu.org/dept/ind-rel/sc/APWU Contract 2006-2010.pdf>.

2. a. In 2002, petitioner worked as a full-time USPS employee in Dorado, Puerto Rico. Pet. App. 2a. In October of that year, petitioner's request to transfer to a part-time, permanent position about 70 miles away in Moca, Puerto Rico was granted by her supervisor effective November 2, 2002. *Id.* at 2a, 17a-18a; J.A. 32. Later in November, petitioner requested to be transferred back to the Dorado Post Office, and her request was denied. Pet. App. 2a, 18a. In February 2003, petitioner (who was then 45 years old) filed an EEO complaint with the USPS alleging that the denial of her second transfer request was the result of age discrimination. *Id.* at 2a, 19a.

Petitioner contends that she subsequently experienced various forms of retaliation for filing her administrative complaint. Petitioner claims that her co-workers began to harass her; that her peers defaced and wrote her name on USPS posters related to sexual harassment; that "her supervisor[s] called her to meetings during which groundless complaints [of sexual harassment] were leveled against her"; and that "her supervisors complained that she was sexually harassing her co-workers, when in fact she was not." Pet. App. 2a-3a; J.A. 32, 34. Petitioner further states that her part-time work hours were significantly reduced. Pet. App. 3a.

b. Petitioner filed suit in the United States District Court for Puerto Rico alleging age discrimination and retaliation under the ADEA. Pet. App. 19a. The district court granted summary judgment to the government on petitioner's claim of age discrimination, *id.* at 20a, and dismissed petitioner's retaliation claim on the ground that the ADEA did not waive the government's sovereign immunity from retaliation-based claims. *Id.* at 21a-32a. The district court explained that it "is settled law"

that waivers of sovereign immunity must "be narrowly construed in favor of the sovereign" and held that Section 633a of the ADEA does not waive such immunity from retaliation claims. *Id.* at 22a, 29a-30a. Among other things, the court concluded that the language Congress enacted to prohibit retaliation by private employers in Section 623(d) of the Act demonstrates that the text in Section 633a(a) does not prohibit retaliation. *Id.* at 29a-30a.

c. The court of appeals affirmed. Pet. App. 1a-10a. The court ruled that, while "sovereign immunity does not present a bar to bringing an ADEA suit against the USPS" because the Postal Reorganization Act, 39 U.S.C. 101 *et seq.*, waives the USPS's sovereign immunity, the statutory "prohibition on 'discrimination based on age'" in Section 633a(a) of the Act does not authorize plaintiffs "to bring a cause of action against the federal government for retaliation." *Id.* at 2a, 4a.

The court explained that the "plain text" of Section 633a(a) "clearly prohibits discrimination against federal employees (over forty years old) based on age, but says nothing that indicates that Congress meant for this provision to provide a cause of action for retaliation for filing an age-discrimination related complaint." Pet. App. 4a-5a. The court found this omission significant because there is a "clear difference between a cause of action for discrimination and a cause of action for retaliation." *Id.* at 5a. Whereas a "substantive [anti-discrimination] provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status," an "anti-retaliation provision seeks to prevent harm to individuals based on what they do," not "who they are." *Ibid.* (quoting *Burlington N. & Santa Fe Ry.* v. *White*, 126 S. Ct. 2405, 2412 (2006)). Given that basic difference, the court con-

cluded that if "Congress had meant to provide for both causes of action, it would have said so explicitly." *Ibid.*

The court of appeals further found that its conclusion was confirmed by the structure of the ADEA and its private-sector retaliation provision. Pet. App. 7a-8a. The court noted that Section 623(d)'s anti-retaliation provision specifically focuses on protected conduct rather than status in prohibiting an employer from discriminating against an employee because she either "has opposed any practice made unlawful by this section" or has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the Act]." *Ibid.* (quoting 29 U.S.C. 623(d)). Given that Congress used such particular anti-retaliation language in Section 623(d) but omitted similar language from Section 633a(a), the court concluded Congress acted "intentionally and purposefully in the disparate inclusion or exclusion." *Id.* at 8a (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). Indeed, the court found that conclusion particularly appropriate here, because Congress "demonstrated that it knew how to provide a statutory right" to protection against retaliation by doing "so elsewhere in the very 'legislation cited.'" *Id.* at 9a (quoting *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981)).

The court further explained that, by enacting Section 633a(f) to specify that federal personnel actions in Section 633a(a) "shall not be subject to, or affected by," any other provision of the Act, Congress specifically indicated that it "did not want the expansive private-sector provisions of the ADEA extended to federal employees." Pet. App. 9a-10a. Section 633a(f), the court explained, distinguishes the ADEA from the federal-sector provision of Title VII of the Civil Rights Act of 1964,

42 U.S.C. 2000e *et seq.*, which several courts have concluded expressly incorporates Title VII's private-sector retaliation provision. *Id.* at 9a.

The court of appeals rejected petitioner's contention that *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), supports a contrary result. Pet. App. 6a-7a. First, it explained that *Jackson* involved the scope of a judicially created cause of action inferred from Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and that *Jackson* specifically rejected comparisons to Title VII on this ground because, in the inferred rights context, the judiciary assumes primary responsibility for defining the contours of the right inferred. *Id.* at 6a. Second, the court observed that *Jackson* based its holding in part on a conclusion that did not readily apply in the ADEA context, namely, that a retaliation remedy was necessary to further Title IX's objectives because coaches and teachers, although not themselves the targets of sex discrimination, were often in the best position to identify such discrimination in educational programs. *Id.* at 6a-7a. Finally, the court noted that Title IX was enacted against the backdrop of *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which had held that a statute barring discrimination based on race gave rise to an inferred right of action to sue for retaliation. Pet. App. 7a. The court concluded that the nature of the statute and policies in *Jackson* were different from those involved in the ADEA, and, thus, declined to extend *Jackson* to the ADEA context. *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly held that the ADEA does not create a private right of action for retaliation in the federal-sector context.

A. Section 633a(a) of the ADEA provides that, in certain federal agencies including the USPS, "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age * * * shall be made free from discrimination based on age." 29 U.S.C. 633a(a). The most natural reading of that prohibition on "age" discrimination, especially in contrast to the private-sector provisions separately prohibiting discrimination and retaliation, is that it prohibits discrimination based on the status—that is, the age—of the individual subjected to the personnel action, not the individual's participation in EEO activity.

Other provisions of the ADEA confirm that Section 633a(a) does not confer an anti-retaliation right. First, as noted, the private-sector provisions of the ADEA contain an express anti-retaliation provision that protects all employees (not just those 40 and above) from retaliation and clearly defines the treatment constituting retaliation as being taken *because of* the employee's conduct, *i.e.*, the employee's opposition to a discriminatory practice or participation "in any manner" in the EEO process. 29 U.S.C. 623(d). Second, Congress underscored its intent to separate the federal-sector prohibitions in Section 633a(a) from the Act's private-sector provisions—including Section 623(d)—by adding Section 633a(f), which states that the federal-sector provisions "shall not be subject to, or affected by, any other provision [of the Act]." That section precludes engrafting the separate anti-retaliation prohibition in Section 623(d)

onto Section 633a. See *Lehman* v. *Nakshian*, 453 U.S. 156 (1981).

Jackson v. *Birmingham Board of Education*, 544 U.S. 167 (2005), does not support the contrary conclusion. *Jackson* made clear that its construction of Title IX turned on the particular statutory context of that statute and the inferred nature of the cause of action. The Court emphasized statutory context by explaining that Title IX was "vastly different" from Title VII because Title IX includes only one, unelaborated prohibition on "discrimination" whereas Title VII includes multiple and more detailed provisions that illustrate that Congress gave the term "discrimination" different meanings in different contexts within Title VII. *Id.* at 175. Here, the separate and distinct prohibitions on discrimination and retaliation in Section 623(a)(1) and (d) make it difficult to conclude that the single prohibition in Section 633a(a) does the same work as the two separate provisions in Section 623. In addition, the Court in *Jackson* pointed out that "Title IX's cause of action is implied, while Title VII's is express." *Ibid.* While courts have a responsibility to ensure that a cause of action they infer is workable and sensible, the courts' responsibility when confronted with two distinctly worded express causes of action is to give Congress's different approaches different effects.

B. Congress's decision to leave retaliation outside the scope of Section 633a(a) does not leave federal employees without a remedy for retaliation. The remedy lies in the distinct protections of the Civil Service Reform Act (CSRA). The CSRA prohibits personnel practices taken in retaliation for the exercise of an employee's rights under the ADEA or the employee's participation in the EEO process, and establishes a right of

judicial review. The Court should avoid construing Section 633a in a manner that could disrupt the careful balance struck by Congress in declining to address retaliation in Section 633a, but rather establishing a comprehensive statutory framework of administrative and judicial review of retaliatory personnel actions. While the USPS operates under a distinct personnel system, that system provides an analogous bar on retaliation to USPS employees like petitioner, with an appropriate means of challenging allegedly retaliatory action.

C. Petitioner's contention that Section 633a(a) of the ADEA prohibits retaliation because Congress generally patterned the text of Section 633a(a) on Title VII's federal-sector provision is incorrect. This Court has declined to engraft Title VII law onto the ADEA where there are textual differences between the statutes. *Smith* v. *City of Jackson*, 544 U.S. 228, 240 (2005). While several courts of appeals have concluded that Title VII's federal-sector provision prohibits retaliation, that conclusion is based on the fact that Title VII's federal-sector provisions expressly *incorporate* a portion of Title VII's private-sector provisions addressing retaliation. The ADEA, in contrast, specifically states that the federal personnel actions subject to Section 633a(a) "shall not be subject to" any of the Act's private-sector provisions. 29 U.S.C. 633a(f). That textual distinction only reinforces the conclusion that Section 633a(a) of the ADEA, unlike the Act's private-sector provisions, does not prohibit retaliation.

D. Petitioner's reliance on the legislative history of the ADEA is unavailing. The legislative history does not address whether Congress intended Section 633a(a) to prohibit retaliatory personnel actions, and the few general statements that petitioner cites in that history are

consistent with the view that Congress intended Section 633a(a) to prohibit substantive age discrimination, but not retaliation. Therefore, although it is not necessary for the Court to delve into the legislative history to decide this case, what is there lends no credence to petitioner's construction of the Act.

E. Petitioner's contention that regulations issued by the CSC and the EEOC interpret Section 633a(a) as prohibiting retaliation is incorrect. The CSC and EEOC regulations governing the administrative processing of complaints cut against petitioner's position, because they confirm that both the CSC and the EEOC have continued to treat retaliation and age discrimination as distinct claims. Although the EEOC has made a "general policy" statement that persons should not be subjected to retaliation for opposing practices made unlawful by various statutes including the ADEA, that statement—added in 1992—does not purport to be a construction of Section 633a(a) and, in any event, is consistent with the fact that federal employees are already generally protected from reprisals for engaging in protected activity under the ADEA and other laws under the CSRA and related administrative regime.

F. To the extent that the Court has any doubt about the proper construction of Section 633a(a), the general rule against interpreting ambiguous statutes as creating new causes of action against the sovereign precludes recognizing a cause of action for retaliation under Section 633a. In the end, however, resort to legislative history and sovereign immunity principles is unnecessary. The plain text of Section 633a(a) and the contrast with the separate prohibitions on discrimination and retaliation in the private-sector provisions of the ADEA suffice

to reject petitioner's view and affirm the decision under review.

ARGUMENT

THE ADEA DOES NOT ESTABLISH A CAUSE OF ACTION AGAINST THE GOVERNMENT FOR RETALIATION IN THE FEDERAL-SECTOR CONTEXT

The statutory text and context both make clear that the federal-sector provision of the ADEA—Section 633a—does not provide a cause of action for a federal employee to sue for alleged retaliation under the Act. That does not mean that federal employees are without protection from retaliation in the workplace. To the contrary, a separate regime—now codified in the Civil Service Reform Act—has generally ensured that executive branch employees may challenge prohibited employment practices free from the threat of retaliation. That alternative remedy ensures that federal employees are generally not without protection against retaliation and explains Congress's decision to treat federal employees differently from all others.

Congress's enactment of Section 633a(a) of the ADEA in 1974 was just one step in a series of congressional and executive branch responses to the problem of discrimination in federal employment. Before 1974, the Civil Service Commission adjudicated employment-discrimination complaints under regulations that expressly prohibited retaliation in the EEO complaint process. Writing against that background, Congress enacted Section 633a to make age discrimination in federal personnel actions unlawful and to strengthen the CSC's existing administrative complaint process, while leaving retaliation claims to be adjudicated under the CSC's supervision. Congress subsequently confirmed in 1978

that the ADEA's private-sector anti-retaliation provision does not apply to the federal employment context and, that same year, substantially reformed federal personnel law to codify, among other things, the CSC's pre-existing authority to redress retaliation for employees' participation in EEO activity.

As explained below, the language of Section 633a, text and structure of other provisions within the ADEA, legal background surrounding the Act, and canons of construction applicable to statutory waivers of sovereign immunity all confirm that Section 633a(a) authorizes older employees to bring suit for prohibited age discrimination in federal personnel actions, but is not the source of federal employees' protection against retaliation based on participation in the EEO process. Instead, such retaliation claims must be pursued under other statutory and regulatory provisions governing federal employment practices.

A. The Plain Language Of Section 633a(a) And The Structure Of The ADEA Both Demonstrate That Section 633a(a) Does Not Prohibit Retaliation For Protected Activity

1. Section 633a(a) of the ADEA provides that, in certain federal agencies including the USPS, "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age * * * shall be made free from any discrimination based on age." 29 U.S.C. 633a(a). The most natural reading of that prohibition on "age" discrimination in personnel actions affecting individuals whose "age" is 40 or more is one that prohibits discrimination *based on the status*—and in particular, "age"—of the individual subjected to the personnel action, and not whether the individual—

regardless of his or her age—has engaged in EEO activity.

Like another substantive anti-discrimination provision this Court has addressed, Section 633a(a) promotes a "workplace where individuals are not discriminated against because of their * * * status" (age) and "seeks to prevent injury to individuals based on who they are" rather than "what they do." *Burlington N. & Santa Fe Ry.* v. *White*, 126 S. Ct. 2405, 2412 (2006) (*Burlington*).

Petitioner's position that Section 633a(a) provides broad protection from retaliation for participation in EEO activity is in considerable tension with the other restrictions that Congress included in the statutory language. First, Section 633a(a) excludes from its prohibition personnel actions affecting employees younger than 40 even though such employees may serve as representatives or witnesses or otherwise play important roles in the EEO process. Given that a significant percentage of employees in many if not most workplaces are younger than 40, it would be particularly anomalous for Congress to except such individuals from the scope of an anti-retaliation provision that applied to employees older than 40, since such younger employees would (by virtue of their numbers alone) serve as an important pool of potential witnesses. See 29 U.S.C. 631(b) ("[T]he prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age."). The private-sector anti-retaliation provision addresses this anomaly by extending the protection against retaliation beyond the class protected by the basic anti-discrimination provision to "any" employee. 29 U.S.C. 623(d). In the public-sector context, it remains an anomaly.

Second, the limited scope of Section 633a(a)'s core prohibition on age discrimination also is at odds with the argument that Section 633a(a) confers a broad, anti-retaliation right as well. Section 633a(a)'s protection is limited to "personnel actions," which, in the federal sector, involve employees' compensation, terms, conditions, and privileges of federal employment. See *George* v. *Leavitt*, 407 F.3d 405, 410-411 (D.C. Cir. 2005) (Title VII); *Page* v. *Bolger*, 645 F.2d 227, 233 (4th Cir.) (en banc) (Title VII), cert. denied, 454 U.S. 892 (1981); cf. 5 U.S.C. 2302(a)(2)(A) (defining "personnel action" in civil service context to include any "significant change in duties, responsibilities, or working conditions"). The text of Section 633a(a) does not reach "actions not directly related to * * * employment" or actions causing "harm outside the workplace," both of which this Court has found to be significant forms of retaliation. See *Burlington*, 126 S. Ct. at 2412. Section 633a(a) therefore is by its terms not designed to serve the broad function that petitioner suggests.

2. The surrounding provisions of the Act and "broader context of the statute as a whole," *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997), bolster the conclusion that Section 633a(a) prohibits age discrimination, but not retaliation for protected activity. As the court of appeals concluded, both the private-sector provisions of the ADEA and the 1978 amendments to the Act confirm that Congress left retaliation beyond the reach of Section 633a(a) and "that if Congress had meant to provide for [retaliation], it would have said so explicitly in § 633a." Pet. App. 5a; see *id.* at 7a-10a.

a. The ADEA's provisions governing the conduct of private-sector employers illustrate that, when Congress intended to prohibit retaliation in the Act, it used lan-

guage explicitly manifesting such intent. Section 623(d) explicitly protects all employees engaging in protected EEO activity. Section 633a(a)—the federal-sector provision—contains no similar retaliation language, and the strong presumption is that that omission reflects that Congress acted "intentionally and purposely" in including such language in Section 623 of the Act and excluding it from Section 633a. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted); see also *Burlington*, 126 S. Ct. at 2412; *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987).

The text prohibiting private-sector retaliation in Section 623 demonstrates the verbal formulation that Congress uses to proscribe retaliation in the ADEA context. Section 623(d) makes it unlawful for an employer to "discriminate against any of his employees * * * because such individual * * * has opposed any practice made unlawful by this section, or because such individual * * * has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the Act]." 29 U.S.C. 623(d). This formulation contains two traits distinguishing it as a prohibition on retaliation, both of which are absent from Section 633a(a).

First, Section 623(d) uses the term "discrimination," but, unlike Section 633a(a), does not contain the term "age." Instead, Section 623(d) specifically prohibits discrimination against "any" employee *because* of such employee's participation in EEO activity. That formulation reflects the essence of retaliation, that is, discriminatory treatment targeting employees "based on what they do, *i.e.*, their conduct," rather than "who they are." *Burlington*, 126 S. Ct. at 2412. Section 623(d) thus contrasts sharply with the Act's primary private-sector pro-

hibition on age discrimination in Section 623(a)(1), which prohibits "discriminat[ion]" against an employee "because of such individual's age." 29 U.S.C. 623(a)(1). Compared to these provisions, Section 633a(a)'s prohibition on "discrimination based on age" in personnel actions affecting employees only if they are "at least 40 years of age" parallels the substantive prohibition on age discrimination in Section 623(a) and bears no resemblance to the anti-retaliation right set forth in Section 623(d) of the Act's private-sector provisions.

Second, Section 623(d) does not contain limiting language restricting its prohibitions to "personnel actions," 29 U.S.C. 633a(a), or matters affecting the "compensation, terms, conditions, or privileges of employment," 29 U.S.C. 623(a)(1). Cf. *Burlington*, 126 S. Ct. at 2412, 2415 (construing parallel text in Title VII to prohibit retaliatory acts that a reasonable employee would find "materially adverse"). The absence of such language in Section 623(d) and its presence in Section 633a(a) reflect a difference in the purposes of the two provisions. Whereas an "anti-discrimination provision" like Section 633a(a) does "not need to prohibit anything other than employment-related discrimination," a retaliation provision like Section 623(d) may sweep more broadly to capture forms of retaliation that can occur outside the workplace. See *id.* at 2412.

Given these textual differences, it would be anomalous to interpret Section 633a(a) not only as a prohibition on age discrimination in federal employment, but also as a broad bar on retaliation. This Court has previously refused to read Section 633a as if it incorporates text used in ADEA provisions governing private employment, *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), and it should similarly refuse to do so here.

The question in *Lehman* was whether Section 633a(c) authorizes jury trials in ADEA suits against the government. In concluding that it does not, the Court found it significant that Section 633a "contrasts" with the Act's private-sector provisions, which "expressly provide[] for jury trials." 453 U.S. at 162. Because Congress had "demonstrated that it knew how to provide a statutory right to jury trial when it wished to do so elsewhere in the very 'legislation cited,'" yet "failed explicitly to do so" in Section 633a, *Lehman* concluded that Section 633a should not be read as including the missing text. *Ibid.* (citation omitted). That reasoning applies with equal force here, since Congress "demonstrated [in Section 623(d)] that it knew how to provide a statutory right [against retaliation] when it wished to elsewhere in the very 'legislation cited,'" but "in [Section 633a] failed explicitly to do so." *Ibid.* (citation omitted).[2]

Petitioner relies heavily on this Court's decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2004). But *Jackson* cannot bear the weight that petitioner has placed on it and, in fact, the reasoning of *Jackson* cuts decidedly against petitioner.

In *Jackson*, the Court addressed the scope of the inferred right of action in Title IX of the Education Amendments of 1972, which provides that "[n]o person * * * shall, on the basis of sex, * * * be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.

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[2] Petitioner's attempt to limit *Lehman* to contexts where two statutory provisions are nearly "identical," Br. 41-42, is inconsistent with the rationale of *Lehman*. When Congress has addressed a specific issue in one part of a statute with text clearly reflecting its intent, the absence of similar text in another part of the statute suggests that Congress did not intend the same result to hold in both places.

1681(a). After discussing the statutory context surrounding Title IX, and its enactment in the wake of this Court's decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Court held that Title IX includes an inferred private right of action for retaliation taken against a person because that person has complained of sex discrimination. *Jackson*, 544 U.S. at 173-174.

Jackson explained that the Court's prior decisions had repeatedly "construe[d] 'discrimination' under Title IX broadly," and that, in light of those decisions, "'[d]iscrimination' is a term that covers a wide range of intentional unequal treatment" in the particular context of Title IX. 544 U.S. at 174-175. The Court further emphasized that Title IX involves only one, "broadly written general prohibition on discrimination," and does not contain any other provisions "list[ing] *any* specific discriminatory practices." *Id.* at 175. While acknowledging that a more narrow reading of "discrimination" could be warranted by Congress's "failure to mention one such practice" in a statute like Title VII of the Civil Rights Act of 1964, which has multiple provisions "spell[ing] out in greater detail the conduct that constitutes discrimination" (including a provision that "expressly" prohibits retaliatory acts), *Jackson* explained that Title VII is a "vastly different statute" and that the failure to include such detail in Title IX's sole anti-discrimination provision "does not tell us anything about whether [Congress] intended" retaliation to be covered. *Ibid.*

Instead, the Court concluded that its earlier interpretation of the "general prohibition on racial discrimination" in 42 U.S.C. 1982 as authorizing an inferred private right of action for retaliation in *Sullivan* likely influenced Congress in its 1972 enactment of Title IX—

just three years after *Sullivan*. *Jackson*, 544 U.S. at 176. The Court thus ultimately found that Title IX incorporates the same understanding of "discrimination" reflected in *Sullivan*. *Id.* at 176-177.

Jackson reinforces the settled rule of statutory construction that context matters. See *Textron Lycoming Reciprocating Engine Div., Avco Corp.* v. *UAW*, 523 U.S. 653, 657 (1998) (It is a "fundamental principle of statutory construction" that "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.") (quoting *Deal* v. *United States*, 508 U.S. 129, 132 (1993)). In fact, *Jackson* concluded that an interpretive approach that might be appropriate for Title VII's more detailed provisions was inappropriate in the context of Title IX.[3]

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[3] The United States' amicus brief in *Jackson* likewise explained that a "general nondiscrimination provision does not invariably encompass a prohibition against discriminatory retaliation" and that "[o]ther relevant indicators of statutory intent could show that retaliation is *categorically excluded* from a broad nondiscrimination provision." U.S. Br. at 10 n.1, *Jackson*, *supra* (No. 02-1672) (emphasis added). As discussed, here, unlike *Jackson*, there are numerous indicators of statutory intent—including the fact that Congress explicitly included an anti-retaliation right in the ADEA's private-sector provisions, but omitted any such right in the Act's federal-sector provision—that demonstrate that Section 633a(a) does not confer an anti-retaliation right.

The statutory context is also markedly different for retaliation claims under 42 U.S.C. 1981, which are at issue in *CBOCS West, Inc.* v. *Humphries*, cert. granted, No. 06-1431 (Sept. 25, 2007). Like the statute at issue in *Jackson*, Section 1981 involves a private right of action that has been inferred by this Court. See, *e.g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975). Since it was amended by the Civil Rights Act of 1991, the statutory framework of Section 1981 is no longer as abbreviated as the Title IX provision construed in *Jackson*, but it still lacks the complex, inter-related

In light of the different statutory context and in particular the separate prohibitions of age discrimination and retaliation in the private-sector provisions of the ADEA, this case is "vastly different" (544 U.S. at 175) from *Jackson*. A comparison of different provisions *within* a statute is one of the most reliable measures of congressional intent. Not only is it "fundamental that a section of a statute should not be read in isolation from the context of the whole Act," *Richards* v. *United States*, 369 U.S. 1, 11 (1962), it is well-established that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23 (citation omitted). And, of course, Congress's decision to address federal employment separately at the same time it extended the private-sector provisions to state governments makes it particularly difficult to dismiss the absence of a standalone retaliation prohibition in Section 633a(a).

Consequently, *Jackson*'s recognition that Title VII is "vastly different" from Title IX because Title VII contains multiple provisions "spell[ing] out in greater detail" the conduct that constitutes "discrimination" (including a provision governing retaliation) supports the

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provisions of Title VII or the ADEA. Moreover, this Court's decision in *Sullivan* has particular salience for the interpretation of 42 U.S.C. 1981. In *Sullivan*, this Court held that "the general prohibition on racial discrimination" contained in 42 U.S.C. 1982 provides a cause of action for "retaliation against those who advocate the rights of groups protected by that prohibition," *Jackson*, 544 U.S. at 176 (describing *Sullivan*), and, in light of their common history, it has construed Section 1981 and Section 1982 in parallel. See, *e.g.*, *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973).

conclusion that Section 633a(a) of the ADEA does *not* embody a prohibition on retaliation. 544 U.S. at 175. Like Title VII, the ADEA contains multiple provisions governing "discriminatory" acts in different contexts, see, *e.g.*, 29 U.S.C. 623(a)(1), (b) and (c)(1), 633a(a), and specifically includes language in Section 623(d) prohibiting retaliation by banning "discrimination" based on an individual's opposition to an unlawful practice or participation in EEO activity. 29 U.S.C. 623(d).

Moreover, the ADEA, unlike Title IX, contains an express, rather than an inferred, right of action. The *Jackson* court emphasized that this feature distinguished its analysis of Title IX from one appropriate for Title VII, see *Jackson*, 544 U.S. at 175 (citing *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-284 (1998)), and, in contexts concerning inferred rights of action, this Court has recognized the need for a "measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Gebser*, 524 U.S. at 284. Indeed, because "Title IX's enforcement scheme would unravel" and "the underlying discrimination would go *unremedied*" if "retaliation were not prohibited," the Court in *Jackson* construed Title IX's use of the term "discrimination" in light of that remedial concern. 544 U.S. at 180-181 (emphasis added).

As discussed below, the same stark remedial concern is not presented in this case because there are other provisions of federal law that generally protect federal employees from retaliation in the workplace. See Part B, *infra*. More fundamentally, however, the *Jackson* analysis for interpreting the scope of an inferred cause of action based on an unelaborated prohibition on "discrimination" in the absence of a statutory enforcement provision simply does not extend to statutes—like the

ADEA or Title VII—that establish express causes of action and contain additional relevant text that directs and confines the Court's inquiry into such matters. See 544 U.S. at 175 (Title VII is "a vastly different statute from Title IX" because "Title IX's cause of action is implied, while Title VII's is express.").[4]

b. Congress underscored its intent to separate the federal-sector prohibitions in Section 633a(a) from the ADEA's private-sector provisions—including Section 623(d)—when it amended the ADEA in 1978 to clarify that "[a]ny personnel action * * * referred to in [Section 633a(a)] shall not be subject to, or affected by, any provision of [the ADEA] other than the provisions of [S]ection 631(b)" and Section 633a. See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 5(e), 92 Stat. 191 (29 U.S.C. 633a(f)). As this Court has stressed, that provision "clearly emphasized that [Section 633a] was self-contained and unaf-

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[4] Petitioner advances multiple arguments based on *Jackson*, each of which extends *Jackson*'s (or *Sullivan*'s) interpretation of a stand-alone anti-discrimination provision well beyond the contextual limits expressed by *Jackson* itself. See, *e.g.*, Br. 13-14 (retaliation is "discrimination" based on age because it is an intentional response to the nature of a complaint based on age); *id.* at 16 (*Jackson* controls when specific discrimination provision uses sweeping terms such "any" or "all"); *id.* at 17-18, 37 (*Sullivan*'s interpretation of inferred right of action in 42 U.S.C. 1982 would have guided Congress's understanding of Section 633a(a) under *Jackson*'s reasoning). Each such argument fails for the same reasons: 1) text and context matter in statutory construction, and the textual and contextual indications that Section 633a(a)'s prohibition on discrimination does not do the work of the separation prohibitions on discrimination and retaliation in Section 623 are overwhelming, and 2) courts inferring a cause of action have a responsibility to make the resulting cause of action workable and sensible, while courts interpreting two different express causes of action have a responsibility to give Congress's very different approaches different effects.

fected by other sections" of the Act, *Lehman*, 453 U.S. at 168, and so courts were not free to engraft provisions applicable to private employers that were omitted from Section 633a.

The Court in *Lehman* thus concluded that this exclusivity provision in Section 633a(f) supported its conclusion that Section 633a's civil-action provision did not authorize jury trials in suits brought by federal employees where Congress enacted an express jury-trial right in the Act's private-sector provisions yet failed to provide for a comparable right in Section 633a. 453 U.S. at 168. The same reasoning counsels decisively against importing the express prohibition on retaliation in the Act's private-sector provisions (*i.e.*, Section 623(d)) into the federal-sector provisions of the ADEA. Indeed, if anything the conclusion is stronger here than in *Lehman* because in this case petitioner is asking this Court to recognize a new substantive cause of action not expressly delineated in Section 633a, rather than simply flesh out the procedures for the discrimination prohibition that Congress clearly authorized in Section 633a.

That conclusion is bolstered by the origins of Section 633a(a). Before Congress enacted Section 633a in 1974, it had briefly considered making federal and state governments subject to the private-employer provisions of the Act by amending the definition of "employer" to include both the United States and the several states, 118 Cong. Rec. 7746 (1972) (statement of Sen. Bentsen) (introducing S. 3318, 92d Cong., 2d Sess. (1972)), but ultimately used that method only with respect to the states, while enacting Section 633a to apply specially to the federal government. See FLSA Amendments § 28(a)(2) and (b)(2), 88 Stat. 74. Congress was undoubtedly aware in 1974 that the newly enacted Section 633a

did not include text similar to the prohibition on retaliation in Section 623(d), and Congress subsequently "emphasized" (*Lehman*, 453 U.S. at 168) its intent to treat Section 633a as a stand-alone provision for federal personnel actions when it enacted Section 633a(f) four years later in 1978.[5]

Congress's treatment of other employment statutes in the same time frame highlights that Congress knew how to subject the federal government to an express retaliation provision when it wanted to. The FLSA Amendments, which added Section 633a to the ADEA, also made the United States subject to an express retaliation prohibition within the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* See FLSA Amendments § 6(a)(2), 88 Stat. 58 (amending 29 U.S.C. 203(e)(2) to extend FLSA to federal employees); 29 U.S.C. 215(a)(3) (making it unlawful to "discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the FLSA). The fact that Congress amended the FLSA in 1974 to extend its retaliation provision to federal employees at the same

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[5] Petitioner contends (Br. 43) that Section 633a(f) was intended to have the opposite effect, that is, to "ensure that limitations and restrictions [favorable to employers] found in the ADEA's private-sector provisions [were] not incorporated into the federal-sector provision." The legislative history, however, indicates that Congress more broadly intended Section 633a to be "independent of any other section of the act" (except for Section 631(b)), H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 11 (1978), and that history matches the broad text of Section 633a(f). Consequently, Section 633a(f) makes Section 633a(a)'s prohibition on discrimination in federal "personnel actions" self-contained, such that none of the distinct private-sector provisions of the Act, whether favorable or unfavorable to employees, could be engrafted onto Section 633a. Cf. *Lehman*, 453 U.S. at 168.

time that it was creating a distinct statutory scheme in the ADEA for federal employees is another indication that Congress did not want to confer the retaliation right that petitioner asks this Court to infer.

B. The Unique Manner In Which Congress And The Executive Branch Have Addressed Retaliation In The Federal-Sector Context Confirms That Congress Did Not Create An Anti-Retaliation Right In Section 633a(a)

The history of congressional and executive branch responses to the problem of discrimination in federal employment likewise confirms that Section 633a(a)'s prohibition on age discrimination does not extend to retaliation. That history reflects a distinct set of public policy concerns in the civil service sector as well as a tradition—both before and after the enactment of the ADEA—of drawing a clear distinction between retaliation and substantive discrimination in federal employment in both regulatory and statutory text.

Congress is presumed to have been aware of that history when it enacted Section 633a of the ADEA. See *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988). In light of that history, the natural conclusion is that Congress concluded in 1974 that existing regulations prohibiting retaliation in the EEO process would apply to age-based complaints by covered federal employees and, in 1978, codified that regulatory prohibition as part of the Civil Service Reform Act. Such congressional attention to the problem of retaliation and Congress's codification of remedies appropriate in the civil service context further counsel against interpreting Section 633a(a) as an independent prohibition on retaliation.

1. The resolution of retaliation claims within the civil service system implicates distinct policy considerations

not present in the private-sector context. Because no alternative existed to address private-sector retaliation in 1967, a statutory prohibition on retaliation and a means for enforcing that prohibition was essential when Congress enacted Section 623(d) of the ADEA. The civil service system, in contrast, already included a process for addressing EEO retaliation complaints when Congress enacted Section 633a(a) in 1974, and, rather than establish a new process for addressing retaliation claims, Congress understandably focused its efforts on a statutory prohibition on age discrimination that could be addressed in that administrative process.

In light of the availability of impartial review for personnel actions within federal agencies and the CSC (which was itself subject to judicial review), the choice to leave retaliation claims for resolution within the civil service process by decisionmakers familiar with the often-complicated nature of federal personnel practices strikes a reasonable balance between efficiency and the need to protect the integrity of the EEO complaint process. That need to balance workplace protections and efficiency led this Court in *Bush* v. *Lucas*, 462 U.S. 367 (1983), to defer to the pre-CSRA civil service process for resolving federal employees' complaints of retaliation for exercising First Amendment rights, even though Congress had not directly spoken to the availability of such relief and "civil service remedies were not as effective as an individual damages remedy" in federal court. See *id.* at 372, 378, 388-389.

In *Bush*, the Court observed that "[f]ederal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action

may be redressed." 462 U.S. at 385. In light of that scheme, the Court observed that "[t]he question is not what remedy the court should provide for a wrong that would otherwise go unredressed," but "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy." *Id.* at 388. Moreover, the Court observed that that "question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff," and that such a "policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights." *Ibid.*

Congress, of course, was entitled to consider those same considerations in deciding whether to enact a separate cause of action for retaliation against federal employees in the ADEA. And the same factors that caused this Court to refrain from inferring a separate cause of action in *Bush*, *a fortiori*, counsel in favor of respecting Congress's judgment. Indeed, as this Court observed in *Bush*, Congress has "developed considerable familiarity with balancing governmental efficiency and the rights of employees" and "a special interest in informing itself about the efficiency and morale of the Executive Branch," including that of "lower-level Government employees." 462 U.S. at 389. In addition, Congress may "inform itself through factfinding procedures such as hearings that are not available to the courts." *Ibid.* Accordingly, the courts should be particularly reluctant to read new rights and remedies into statutes that Congress has passed concerning federal employees to en-

sure that they do not mistakenly disrupt the balance that Congress has intentionally struck between "governmental efficiency and the rights of employees" (*ibid.*) in any given context.

2. Before Congress applied either Title VII or the ADEA to federal personnel actions, discrimination in federal employment was prohibited by executive order as authorized by statute. See Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970) (stating non-discrimination policy and requiring prompt, fair, and impartial complaint process); see, *e.g.*, 5 U.S.C. 3301, 3302, 7151-7154 (1970). Federal civil service regulations implemented that policy by establishing an EEO complaint process and expressly prohibiting retaliation for activities related to such complaints. Cf. 5 U.S.C. 1301 (1970). Those regulations authorized executive branch employees to bring EEO complaints regarding matters believed to be discriminatory, including "personnel action[s]," 5 C.F.R. 713.211, 713.214(a)(1)(i) (1972), and further provided that such complainants, their representatives, and witnesses "shall be free from restraint, interference, coercion, discrimination, or reprisal" for participating in the complaint process. 5 C.F.R. 713.214(b), 713.218(e), 713.219(a) (1972); see also Exec. Order No. 10,987, 3 C.F.R. 520 § 3(6) (1959-1963) (employees "shall be assured freedom from restraint, interference, coercion, discrimination, or reprisal" for appealing adverse employment actions).

Before 1974, the regulations provided a two-tiered process for addressing discrimination complaints based on the severity of the disputed personnel action.[6] More

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[6] The regulations were revised in 1974 to establish a single administrative process for all complaints alleging either a discriminatory

serious personnel actions, such as removal, suspension, or a reduction in rank or pay (known as an "adverse action"), could be challenged before the employing agency and appealed to the CSC, see 5 C.F.R. 713.219(a) and (b), 752.101, 771.202, 771.208 (1972), whereas other personnel actions and "any [other] matter of concern or dissatisfaction" to the complainant could be challenged under alternative agency hearing procedures followed by an appeal to the CSC. See 5 C.F.R. 713.217(b), 713.218, 713.219(a) and (c), 713.231(a), 771.302(a) (1972). Retaliation was prohibited regardless of the manner of review. See 5 C.F.R. 713.219(a) and (c) (1972) (applying Part 713 anti-retaliation provisions to all discrimination complaint procedures except certain administrative appeals to the CSC); 5 C.F.R. 771.105(a)(1) and (b)(1), 771.211(e) (1972) (anti-retaliation provisions for proceedings before the CSC). Personnel actions ultimately determined to be improper or erroneous were required to be corrected with remedial action, 5 C.F.R. 713.204(d)(7)-(8), 713.221(c) (1972), and, if appropriate, back pay. See 5 C.F.R. 550.803(d), 550.804 (1972). And limited judicial review was available. See, *e.g.*, *Frommhagen* v. *Klein*, 456 F.2d 1391, 1393 (9th Cir. 1972); *Predmore* v. *Allen*, 407 F. Supp. 1067, 1071-1072 & n.8 (D. Md. 1976) (reviewing reprisal claim under 1969 regulations); cf. *United States* v. *Fausto*, 484 U.S. 439, 444-445, 454 (1988).

Those regulations were revised after Congress amended Title VII in 1972 to codify the prohibition on discrimination in federal "personnel actions" based on race, color, religion, sex, or national origin. See Equal

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matter or discriminatory "personnel action" with subsequent review by the CSC. See 5 C.F.R. 713.214(a)(1)(i), 713.219, 713.231 (1975).

Employment Opportunity Act of 1972 (EEO Act), Pub. L. No. 92-261, § 11, 86 Stat. 111 (42 U.S.C. 2000e-16). That amendment authorized the CSC to enforce that prohibition and to issue "rules, regulations, orders, and instructions" to carry out its responsibilities under the amendment. *Ibid.*

The CSC "revised" its existing EEO regulations later in 1972 both to implement Title VII "and to strengthen the [existing] system of complaint processing" pursuant to the CSC's pre-existing authority under statute and executive order as well as its rulemaking authority under Title VII (EEO Act § 11, 86 Stat. 111). See 37 Fed. Reg. 22,717 (1972) (listing authority); cf. 5 C.F.R. Pt. 713 (1972) (listing prior authority).

The revised regulations, among other things, continued to distinguish between "complaints of discrimination on grounds of race, color, religion, sex, or national origin," 5 C.F.R. 713.211 (1973), and a charge by a "complainant, his representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint," 5 C.F.R. 713.262(a) (1973). The amendments required "timely investigation and resolution of complaints including complaints of coercion and reprisal," 37 Fed. Reg. at 22,717; 5 C.F.R. 713.220 (1973), and made explicit the process for pursuing such complaints of retaliation. 5 C.F.R. 713.261, 713.262 (1973). The revision likewise made explicit the breadth of remedies available, including, but not limited to the "[c]ancellation of an unwarranted personnel action" and a "full opportunity" to participate in any benefit denied. 5 C.F.R. 713.271(b)(3) and (5) (1973); see 5 C.F.R. 713.262(b)(1) (1973) (CSC "shall require the agency to take whatever action is appropriate" concerning reprisal claim).

When Congress amended the ADEA in 1974 to prohibit age discrimination in federal personnel actions and to authorize the CSC to "provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age," FLSA Amendments § 28(b)(2), 88 Stat. 75 (29 U.S.C. 633a(b)(3)), it would have been aware of the CSC's EEO procedures and its revised regulations clarifying the process for pursuing claims of reprisal. Congress, however, did not enact language for Section 633a(a) to track the specific retaliation language in the regulations and, unlike those regulations, did not adopt language covering all employees who participate in the EEO process as representatives or witnesses. Those omissions presumably reflect the reasonable expectation that the CSC's established EEO process for discrimination complaints, which already included provisions prohibiting and remedying reprisal, would be applied when processing complaints of age discrimination. The CSC promptly followed that obvious course by amending its regulations in 1974 to add age discrimination complaints to its existing EEO process and reprisal regulations. See 5 C.F.R. 713.511 (1975); 39 Fed. Reg. 24,351 (1974).[7]

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[7] Petitioner incorrectly asserts (Br. 26-27) that Congress could not have thought that the CSC's existing regulations prohibiting reprisal would apply to age complaints because age discrimination in federal personnel actions was not prohibited until Section 633a(a) was added to the ADEA in 1974. Because the CSC's regulations had expressly prohibited retaliation for participation in EEO activity well before the federal-sector provisions of either Title VII or the ADEA, and those regulations had consistently barred retaliation in connection with any EEO complaint regardless of the type of discrimination alleged, the only reasonable expectation would have been that the CSC would extend its existing reprisal regulations to the processing of complaints under the ADEA—and the CSC in fact did so, less than three months

Congress ultimately codified the longstanding regulatory prohibition on reprisal based on EEO activity when it enacted the Civil Service Reform Act in 1978. The CSRA prohibited supervisors in executive branch agencies from taking or failing to take any "personnel action against any employee" as "a reprisal for the exercise of any appeal right granted by any law, rule, or regulation." CSRA, Pub. L. No. 95-454, § 101(a), 92 Stat. 1116 (5 U.S.C. 2302(b)(9)). As amended, the CSRA prohibits "personnel action[s]" (including any significant change in duties, responsibilities, or working conditions) taken, not taken, or threatened because of "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation" or "testifying for or otherwise lawfully assisting any individual in the exercise of any [such] right." 5 U.S.C. 2302(a)(2)(A)(xi) and (b)(9). Since 1978, this provision has generally prohibited retaliation whenever a federal employee seeks relief under civil rights statutes, including the ADEA. See *In re Frazier*, 1 M.S.P.B. 159, 191-197 (1979), aff'd in part and review dismissed in part, 672 F.2d 150 (D.C. Cir. 1981).[8]

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after Congress added Section 633a to the ADEA. See 39 Fed. Reg. at 24,351.

[8] The CSRA's prohibition on retaliation applies generally to executive branch agencies. See 5 U.S.C. 2302(a)(2)(C). However, Congress has exempted from that prohibition certain agencies, including the Central Intelligence Agency and Defense Intelligence Agency, *ibid.*, as well as positions that are exempt from the competitive service either because of their confidential, policy-determining, policy-making, or policy-advocating character, or because the President has excluded them from coverage based on his determination that it is necessary and warranted by good administration. 5 U.S.C. 2302(a)(2)(B). Employees who fall within the scope of those exemptions will not benefit from the CSRA's prohibition of retaliation, and must instead rely on alternative protections, if applicable. The CSRA's

Where retaliation allegedly results in an adverse action (removal, suspension of more than 14 days, or reduction in pay), the CSRA authorizes an appeal to the Merit Systems Protection Board (MSPB) from an agency determination with review by the Federal Circuit. 5 U.S.C. 7512, 7513(d); 5 U.S.C. 7701-7703 (2000 & Supp. V 2005). Claims of retaliation of a less serious nature must be investigated by the Office of Special Counsel, which, if it finds reasonable grounds to believe retaliation occurred, must report that determination to and may seek corrective action from the MSPB with review by the Federal Circuit. 5 U.S.C. 1214(a)(1)(A), (b)(2)(B), (C), and (c), 7703(b). The MSPB may order appropriate corrective action, 5 U.S.C. 1214(b)(4), 7701(b)(2), the payment of attorney's fees on appeal, 5 U.S.C. 7701(g), and may discipline federal employees for retaliatory acts. 5 U.S.C. 1215. See generally *Fausto*, 484 U.S. at 445-446 (discussing CSRA); *Lindahl* v. *OPM*, 470 U.S. 768, 773-774 (1985) (same).[9]

The "comprehensive nature" (*Fausto*, 484 U.S. at 448) of the CSRA's prohibition on retaliation, like the pre-CSRA tradition of expressly prohibiting EEO retaliation by regulation, contrasts sharply with Section 633a(a)'s prohibition on "discrimination based on age" in personnel actions. The difference in language presumably reflects a difference in policy considerations and the balance struck by Congress in this context. The

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limited exemptions, however, reflect judgments by Congress regarding conflicting policy considerations in particular applications which are not uncommon in the context of federal employment. Cf. *Fausto*, 484 U.S. at 448-449; *Bush*, 462 U.S. at 388-389.

[9] The MSPB may also consider claims of age discrimination under the ADEA in addition to claims of retaliation prohibited by the CSRA. See 5 U.S.C. 7702(a)(1); 29 C.F.R. 1614.302.

Court should avoid construing Section 633a in a manner that could disrupt that balance by engrafting onto the existing statutory and administrative framework an additional right not intended by Congress. Section 633a(a) should therefore be read as prohibiting substantive age discrimination, not retaliation based on protected activity—conduct that was addressed by the CSRA's general prohibition against retaliation.[10]

3. While the USPS operates under a distinct personnel system, see 39 U.S.C. 410(a), 1001, 1206(b), 1209(a), that system similarly protects employees like petitioner from retaliatory action. Congress has directed the USPS to "assure its officers and employees * * * full protection of their employment rights by guaranteeing them an opportunity for a fair hearing on adverse actions," 39 U.S.C. 1001(b), and the USPS *ELM* broadly prohibits "*any* action, event, or course of conduct that * * * subjects any person to reprisal for prior involvement in EEO activity." *ELM* § 665.23, at 681-682 (emphasis added).

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[10] Congress has continued the tradition of using precise retaliation language in applying the ADEA to new governmental contexts. The Congressional Accountability Act of 1995, 2 U.S.C. 1301 *et seq.*, and the Presidential and Executive Office Accountability Act, 3 U.S.C. 401 *et seq.*, both extend Section 633a(a) to prohibit "discrimination based on age" in personnel actions affecting congressional employees and employees within the Executive Office of the President and Executive Residence of the White House. 2 U.S.C. 1311(a)(2); 3 U.S.C. 411(a)(2). Both statutes separately make it unlawful "to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by" the acts or "has initiated proceedings, made a charge, or testified, assisted or participated in any manner in a hearing or other proceeding under" the acts. 2 U.S.C. 1317(a); 3 U.S.C. 417(a).

That prohibition on retaliation applies both to USPS employees who are not covered by a collective bargaining agreement as well as to those who work under a collective bargaining agreement, as all such agreements incorporate the provisions of the *ELM*. See, *e.g.*, *Mail Handlers Agreement* art. 19; *Harrell* v. *USPS*, 445 F.3d 913, 923 (7th Cir.) ("We agree with our sister circuits that Article 19 is sufficient to incorporate the postal handbooks and manuals relating to wages, hours or working conditions into the National Agreement."), cert. denied, 127 S. Ct. 845 (2006). Those employees who are subject to collective bargaining agreements also are protected from discipline without "just cause," which encompasses retaliation for EEO activity. See *Mail Handlers Agreement* art. 16.1; *National Agreement* art. 16.1. The same was true at the time the ADEA was enacted. See USPS & American Postal Workers Union, *National Collective Bargaining Agreement* art. XVI (July 20, 1971)<http://www.apwu.org/dept/ind-rel/sc/oldcbas/APWU%20Contract%201971-1973.pdf>. Thus, while petitioner does not have a cause of action for alleged retaliation under the ADEA, she is not without a means of recourse for remedying any retaliation. See *ELM* §§ 666.21-666.26, at 685-686 (listing overlapping remedial procedures).

C. Material Textual Differences Between Title VII And The ADEA Support The Conclusion That Section 633a(a) Does Not Prohibit Retaliation.

Petitioner contends that Title VII prohibits retaliation in federal personnel actions and that the ADEA should be read in the same way. Br. 4, 19-20. Although the ADEA's federal-sector provisions were in many respects modeled after those in Title VII, material textual

differences between the acts as to the question presented demonstrate that Section 633a(a) does not include a prohibition on retaliation. Indeed, the textual differences between Title VII and the ADEA only strengthen the conclusion that Congress did not intend to adopt an anti-retaliation right in Section 633a(a). This Court reached a similar conclusion in *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), where it observed that "textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under [the] ADEA is narrower than under Title VII." *Id.* at 240.

As petitioner explains, Title VII's federal-sector provision expressly provides that several of Title VII's private-sector provisions shall apply to civil actions brought by federal employees under 42 U.S.C. 2000e-16. Specifically, Title VII's federal-sector provision provides that Section 2000e-5(f) through (k) of title 42, "as applicable, shall govern civil actions brought" by federal employees under Section 2000e-16, see 42 U.S.C. 2000e-16(d). One of those expressly incorporated provisions concerns the remedies available to address claims of private-sector retaliation. Specifically, that provision states that courts shall not order the hiring, reinstatement, or promotion of any individual as an employee or the payment of back pay if the allegedly discriminatory action that injured him was taken "for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a)." 42 U.S.C. 2000e-5(g)(2)(A). The cross-referenced provision (Section 2000e-3(a)), like Section 623(d) of the ADEA, expressly prohibits retaliation for EEO activity in the private sector.

Although the question is not presented here, several courts of appeals have concluded that Title VII's federal-sector requirement that personnel actions be free from "discrimination based on race" or other protected traits, 42 U.S.C. 2000e-16(a), should be read to extend to retaliation in light of Section 2000e-16(d)'s incorporation of a provision that itself expressly references the act's private-sector retaliation provision.[11] But the relationship between the federal- and private-sector provisions of the ADEA is completely different. Rather than incorporate selective private-sector provisions for use in Section 633a, Congress specifically provided that "[any] personnel action[s] * * * referred to in subsection (a) of [Section 633a] shall not be subject to, or affected by, any [private-sector] provisions" in the Act. 29 U.S.C. 633a(f). As this Court explained in *Lehman*, Congress thus "clearly emphasized" in Section 633a(f) "that [Section 633a] was self-contained and unaffected by other sections * * * applicable in actions against private employers." *Lehman*, 453 U.S. at 168. That express rejection of the approach adopted by Congress in Title VII mandates that the contextual interpretation of Title VII advanced by petitioner cannot apply to the ADEA.

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[11] See, *e.g.*, *Hale* v. *Marsh*, 808 F.2d 616, 619 (7th Cir. 1986); *Ayon* v. *Sampson*, 547 F.2d 446, 449-450 (9th Cir. 1976). This case presents no occasion to resolve whether Title VII's federal-sector provision incorporates that act's private-sector retaliation prohibition. The salient point for present purposes is that, even assuming petitioner's reading of Title VII to be correct, the ADEA is distinguishable from Title VII because it does not incorporate any portion of the Act's private-sector provisions. See 29 U.S.C. 633a(f).

D. The ADEA's Legislative History Provides No Support For Petitioner's Claim That Section 633a(a) Prohibits Retaliation

Although it is not necessary to resort to legislative history to resolve this case given the strong textual evidence that Section 633a(a) does not confer an anti-retaliation right, the pertinent legislative history is silent with respect to the question presented and therefore provides no support for petitioner's claim nor any justification for deviating from the statute's plain text.

Petitioner all but concedes the absence of relevant history by arguing that the ADEA's "legislative history is as revealing for what it does not say as for what it does." Br. 29. "Judicial investigation of legislative history" can be complicated enough when a court reviews actual statements by legislators, which are "often murky, ambiguous, and contradictory." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Petitioner's affirmative reliance on silence is not an appropriate means of construing legislative intent regarding Section 633a(a). In any event, especially when viewed against the protections available to federal employees discussed in Part B above, the absence of any indication in the legislative record that Congress believed that Section 633a(a) would confer a cause of action to redress retaliation is, if anything, the most telling "dog that didn't bark."

The few statements that petitioner does cite—regarding the application of "one set of rules," "remov[ing] discriminatory barriers," enacting the "*same protections* against arbitrary employment based on age," and the desire to impose equivalent "restrictions," Br. 30 (citations omitted)—are all consistent with expressions con-

cerning the Act's substantive ban on age discrimination. Petitioner's Rorschach-test interpretation notwithstanding, the ADEA's legislative history simply does not speak to whether Section 633a(a) prohibits retaliation based on an employee's EEO activity.

Nor does legislative history regarding the 1972 extension of Title VII to federal employment help petitioner's cause. Br. 22-23. While some of that history indicates that the CSC's EEO regulations were not entirely effective in processing discrimination complaints before 1972, it does not address whether the regulations were effective in preventing and redressing retaliation or whether Congress understood the CSC's enhanced regulations to have the same difficulties when Section 633a(a) was enacted in 1974. Petitioner's reliance on legislative history is accordingly unavailing.

E. Neither The CSC Nor The EEOC Has Definitively Interpreted Section 633a(a) To Prohibit Retaliation

Petitioner's contention (Br. 22-23, 31-33) that regulations issued by the CSC and the EEOC have interpreted Section 633a(a) as prohibiting retaliation is incorrect. Those regulations confirm that both the CSC and the EEOC continued to treat age discrimination and retaliation as distinct types of charges after the ADEA's enactment.[12] While petitioner suggests that one CSC regulation treated allegations of retaliation "as an individual

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[12] Compare 5 C.F.R. 713.211 (1975) ("[C]omplaints of discrimination on grounds of race, color, religion, sex, or national origin" must be processed under 5 C.F.R. 713.212-.222 (1975)) and 5 C.F.R. 713.511 (1975) (extending Part 713 provisions to govern "processing of complaints of discrimination on account of age"), with 5 C.F.R. 713.262(a) and (b) (1975) (separate provisions governing "charge[s] of restraint, interference, discrimination, or reprisal in connection with the presentation" of a "complaint of discrimination").

complaint of discrimination" (Br. 34), that provision merely provided employees with a "[c]hoice of review procedures" for retaliation allegations, which could be "reviewed as an individual complaint of discrimination" under one set of procedures *or* "as a charge subject to" other procedures unique to retaliation claims. 5 C.F.R. 713.262(a) (1975). That claim-processing regulation, which was retained by the EEOC when it assumed the CSC's ADEA authority in 1978 and was repromulgated by the EEOC in 1987, see 29 C.F.R. 1613.262(a) (1988), lends no support to petitioner's view that the CSC and the EEOC treated retaliation as a subset of age discrimination. Rather, it shows the opposite to be true.

Nor do the EEOC's current regulations conclusively resolve the matter. When the EEOC "consolidat[ed] the complaint processing procedures" in 1992 by replacing repetitive provisions that separately addressed "each type of complaint" under Title VII, the ADEA, and other discrimination statutes with a standard set of regulations generally applicable to complaints of discrimination and retaliation, it stated that retaliation claims under those statutes (including the ADEA) "are considered to be complaints of discrimination for purposes of" the revised regulations. See 57 Fed. Reg. 12,634, 12,647 (1992) (promulgating 29 C.F.R. 1614.103(a)). That provision merely ensures that retaliation claims are *processed* in the same manner as discrimination claims. See *id.* at 12,642 ("Whenever any regulation in this part speaks of a complaint of discrimination, the reference should also be read to include a complaint of retaliation."). Like its regulatory predecessors, that portion of the EEOC's claim-processing regulations does not support petitioner's position because it does not reflect a substantive interpretation of Section 633a(a).

The EEOC's regulations do contain a "[g]eneral policy" statement that "[n]o person shall be subject to retaliation for opposing any practice made unlawful by * * * [the ADEA and various other statutes] or for participating in any stage of administrative or judicial proceedings under those statutes." 29 C.F.R. 1614.101(b). But that statement—added in 1992—does not purport to be a construction of Section 633a(a) of the ADEA (or any other specific provision of the Act) and, as discussed above, executive branch employees who face reprisals for EEO activity under the ADEA do have recourse under the CSRA and the related administrative regime. Accordingly, petitioner's reliance on the EEOC regulations is misplaced.[13]

F. The Court's Reluctance To Broadly Construe Waivers Of Sovereign Immunity Counsels Against Reading Section 633a(a) To Confer An Anti-Retaliation Right

Because the text, structure, and relevant background surrounding Section 633a(a) demonstrate that the provision does not prohibit retaliation against employees for

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[13] Petitioner's reliance on a partial quotation from a footnote in the *EEOC Compliance Manual* is also unavailing. The full quotation shows that the footnote describes the state of the case law at the time. See *EEOC Compl. Man.* § 8-1(A) n.5 (May 20, 1998) <http://www.eeoc.gov/policy/docs/retal.pdf> ("Federal employees are also protected against retaliation under each of the employment discrimination statutes. *See, e.g., Hale v. Marsh*, 808 F.2d 616, 619 (7th Cir. 1986) (recognizing retaliation cause of action for federal employees under Title VII); *Bornholdt v. Brady*, 869 F.2d 57, 62 (2d Cir. 1989) (recognizing retaliation cause of action for federal employees under ADEA)."). Moreover, the *EEOC Compliance Manual*'s reference to retaliation under the ADEA is of no assistance to petitioner because it is based on a decision that treats retaliation for EEO activity under the ADEA as prohibited by the CSRA, not the ADEA. See *Bornholdt*, 869 F.2d at 62.

participating in EEO activity, this Court need not invoke sovereign immunity principles to resolve this case. However, if the text of Section 633a(a) were sufficiently ambiguous, those principles would require that Section 633a(a) be read narrowly as prohibiting substantive age discrimination, but not retaliation.

It is well settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)); see *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). The statutory language of a waiver must therefore be "specific and express," *King*, 395 U.S. at 4, and cannot be enlarged beyond what the language plainly requires. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992); see *Lane* v. *Pena*, 518 U.S. 187, 191-192 (1996). And waivers of the United States' immunity from suit "'must be construed strictly in favor of the sovereign.'" *Nordic Vill.*, 503 U.S. at 34 (quoting *McMahon* v. *United States*, 342 U.S. 25, 27 (1951)).

Those principles constrain the Court's interpretation of Section 633a of the ADEA. See *Lehman*, 453 U.S. at 160, 162 n.9. Congress's waiver of sovereign immunity in Section 633a(c) authorizes aggrieved persons to bring a civil action against the federal government for "such legal or equitable relief as will effectuate the purposes of" the Act. 29 U.S.C. 633a(c). The question presented in this case goes to the scope of the waiver effected by Section 633a(c)—*viz.*, whether recognizing a retaliation remedy in the federal-sector context is necessary to "effectuate the purposes of" the Act. The answer to that question turns not on broad equitable considerations but on whether the text of the federal-sector provisions guarantees such a remedy. In that regard, subsection

(a) and subsection (c) of Section 633a go hand in hand to define the scope of the federal government's waiver of sovereign immunity from suit.

In "traditionally sensitive areas" such as the sovereign's consent to suit, "the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001) (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991), and citing *Nordic Vill.*, 503 U.S. at 33). And such caution is particularly warranted in the context of the rights and remedies granted to federal employees, since any decision by the sovereign to subject itself to suit on such matters requires a delicate balancing of "governmental efficiency and the rights of employees." *Bush*, 462 U.S. at 389.

Petitioner incorrectly contends (Br. 49-50) that whether Section 633a(a) encompasses retaliation claims is not a matter subject to strict construction analysis under Court's decisions involving the Indian Tucker Act, 28 U.S.C. 1505. The Indian Tucker Act contains a waiver of immunity from money-mandating claims based on "the Constitution, laws or treaties of the United States, or Executive orders of the President," *ibid.*, and, in that context, this Court has concluded that the "United States has presumptively consented to suit" to claims that "fall[] within the terms" of that act. *United States* v. *Navajo Nation*, 537 U.S. 488, 502-503 (2003) (quoting *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983)). The ADEA, in contrast, does not provide a waiver of immunity from a general category of claims under other statutes. Because Congress waived sovereign immunity in Section 633a(c) only with respect to claims "for such legal or equitable relief as will effectu-

ate the purposes" of the Act, and included that waiver in Section 633a, it would be anomalous to interpret the scope of Congress's waiver independently from the limits of Section 633a(a).

Petitioner's view (Br. 45-46) that the Postal Reorganization Act's waiver of immunity for the USPS, 39 U.S.C. 401(1), obviates the need to apply a strict construction rule here is also misplaced. That view, shared by the court of appeals (see Pet. App. 4a), fails to account for the fact that Congress intended Section 633a of the ADEA to apply to a wide range of federal agencies for which the Act constitutes the pertinent waiver of immunity. Congress clearly would not have intended the scope of Section 633a—or the meaning of the words in the provision—to vary depending on the agency involved. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983).

To the extent there is any reasonable doubt as to the answer to the question presented, the canon of strict construction ultimately compels the conclusion that the Section 633a(a) prohibits only discrimination based on the individual victim's age, not retaliation. As the contrast with the express anti-retaliation right in Section 623(d) starkly demonstrates, the language in Section 633a(a) does not "unequivocally" encompass retaliation, much less "specific[ally] and express[ly]" subject the United States to liability for retaliation. Cf. *Nordic Vill.*, 503 U.S. at 34 (waiver does not unambiguously extend to relief sought if provision is susceptible to alternative interpretations). Accordingly, even putting aside the strong textual evidence discussed above that Congress did not intend Section 633a(a) to confer an anti-retaliation right, settled principles of statutory con-

struction governing suits against the federal government would compel that result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 2302 provides in relevant part:

Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

* * * * *

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

* * * * *

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; [or]

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)[.]

* * * * *

2. 29 U.S.C. 623 provides in relevant part:

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

* * * * *

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

* * * * *

3. 29 U.S.C. 630(b) provides:

Definitions

For purposes of this chapter—

* * * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * * * *

4. 29 U.S.C. 631(b) provides:

Age Limits

* * * * *

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

5. 29 U.S.C. 633a provides in relevant part:

Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

* * * * *

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

* * * * *

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

* * * * *

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IN THE

Supreme Court of the United States

MYRNA GÓMEZ-PEREZ,

Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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INTRODUCTION AND SUMMARY OF ARGUMENT

As petitioner has shown, § 633a(a) of the Age Discrimination in Employment Act ("ADEA") clearly prohibits retaliation against older workers who complain that they were subjected to age discrimination. This plain meaning is both confirmed and compelled by the fact that the statute's text was copied virtually verbatim from Title VII's federal-sector discrimination ban, which prohibits retaliation; by this Court's construction of a materially indistinguishable discrimination ban in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005); and by the consistent interpretations of two enforcing agencies. In the face of this evidence, the government makes a fleeting "plain language" argument, then spends the bulk of its brief attempting to explain why "contextual" evidence shows that Congress intended to leave federal workers without a judicial remedy for retaliation caused by complaints of age discrimination. In fact, the government ignores or distorts the relevant context, and its reading leads to utterly incongruous results.

A. The contextual fact most critical to understanding § 633a(a) is that it was modeled directly on Title VII's federal-sector discrimination ban, § 717(a), which bars retaliation. By copying the language of § 717(a) into § 633a(a), Congress gave these two discrimination bans the same scope and meaning. The government cannot avoid this conclusion by pointing to irrelevant differences in the remedial schemes of these statute—*i.e.*, the fact that Title VII's private-sector remedies apply to violations of § 717(a), while the ADEA's private-sector remedies are not incorporated into § 633a. Nor is it relevant that § 633a(f) makes the ADEA's federal-sector provisions inde-

pendent of its private-sector provisions. Neither of these facts demonstrates that Congress intended the language of § 633a(a) to have a significantly different, and narrower, meaning than the nearly identical language of § 717(a) of Title VII.

Title VII also illustrates that Congress uses two different verbal formulations for banning retaliation—a general discrimination ban that bars all discriminatory acts, including retaliation, and a particularized enumeration of discriminatory acts that includes retaliation as one such act. In both instances, Congress bars retaliation. Moreover, if, as the government argues, § 633a(a) does not sweep as broadly as the ADEA's private-sector retaliation ban, this same discrepancy in coverage would arise under Title VII's private- and federal-sector provisions. Any such discrepancy, therefore, is hardly an anomaly in federal antidiscrimination law.

The real anomaly is that, under the government's reading, federal workers may sue for retaliation triggered by complaints of discrimination based on race, color, religion, sex, and national origin but not age. The government's speculation about workplace efficiency does not explain this unlikely and unfair distinction. Indeed, its reading renders federal discrimination laws as a whole irrational.

Moreover, the government's contextual arguments provide no basis for concluding that *Jackson*'s textual analysis is inapplicable here. Although Title IX involved an implied right of action, that did not give the *Jackson* Court "latitude" to expand the scope of Title IX's substantive ban. Thus, *Jackson*'s interpretation of Title IX is fully applicable to § 633a(a)'s materially indistinguishable discrimination ban, and confirms that the latter bars retaliation.

B. The fact that the ADEA's private-sector provisions expressly bar retaliation is not evidence that Congress intended to exclude such a prohibition from § 633a(a). The government's negative inference argument fails to account for the fundamental differences between the structure and wording of § 633a(a) (a general ban) and § 623 (an enumeration ban). *Jackson* explained that narrowing inferences cannot be based on comparisons of such disparate provisions, and the government's own cases show that this Court draws negative inferences from comparisons of nearly identical provisions. Moreover, as petitioner has shown, the government's negative inference theory leads to the plainly erroneous conclusion that the ADEA's federal-sector discrimination ban does not prohibit age-discriminatory job notices and advertisements because § 633a(a), unlike § 623(e), fails to mention such practices expressly. The government's failure to respond to this showing simply underscores the impropriety of narrowing § 633a(a)'s general discrimination ban based on an apples-to-oranges comparison with § 623's enumeration ban.

Section 633a(f), which provides that the ADEA's private- and federal-sector schemes are distinct, likewise cannot be used to narrow § 633a(a)'s broad scope. Section 633a(a)'s plain language and historical derivation demonstrate that it prohibits retaliation. Recognizing this does not "engraft" any ADEA private-sector provision onto § 633a, in contravention of § 633a(f).

C. The government hypothesizes that the kinds of concerns that lead this Court to decline to imply a cause of action for federal employees in *Bush* v. *Lucas*, 462 U.S. 367 (1983), may have prompted Congress to deny older workers protection from retaliation, and to hope instead that the Civil Service Com-

mission ("CSC") would extend administrative protections to fill the resulting void. Such speculation, however, cannot override the clear evidence from § 633a(a)'s text and historical origins that it bars retaliation. That speculation is also groundless.

Because the protections against retaliation in then-extant antidiscrimination regulations were based on Title VII, Congress could not have assumed that the CSC would extend such protection to age claims unless § 633a(a) itself barred retaliation. The 1978 Civil Service Reform Act ("CSRA") has no bearing on the 1974 Congress's intent when it adopted § 633a(a). And the government's reliance on the CSRA only makes its position more untenable. The government notes that the ADEA has been extended to congressional and certain presidential employees, and it argues, erroneously, that Congress supplemented the ADEA's protections for these employees with an express retaliation ban. Under the government's view, therefore, Congress chose to protect federal workers from retaliation triggered by complaints of all discrimination barred by Title VII, but chose, for age-based retaliation, to give some federal employees a complete judicial remedy, others a severely restricted administrative remedy, and still others no remedy at all. The government cites no evidence that Congress intended to address retaliation in such a crazy-quilt manner.

D. The interpretations of § 633a(a) by the agencies charged with its enforcement confirm that Congress barred age-based retaliation. In contending otherwise, the government ignores the substance of the CSC's initial regulations, and fails to discuss language in the current EEOC regulations that plainly construes § 633a(a) to bar retaliation.

E. Finally, the government's reliance on sovereign immunity is misplaced. Where Congress authorizes a cause of action against the federal government for violation of a statutory prohibition, rules of strict construction require courts to decide whether certain types of relief apply in an action brought to enforce § 633a(a)'s substantive norm, But those rules do not apply to the norm itself. The government identifies no case in which this Court has used sovereign immunity principles to narrow a substantive norm. Nor does it respond to petitioner's showing that the "double-narrowing" it seeks would lead to unexplained anomalies. In all events, § 633a(a)'s retaliation ban satisfies any clear statement rule.

ARGUMENT

A. The Plain Language And Historical Derivation Of § 633a(a) Show That It Bars Retaliation.

In her opening brief, petitioner demonstrated that § 633a(a) bars retaliation against an older worker because he complains of age discrimination. This is clear from the text of the statute, its derivation from Title VII's federal-sector discrimination ban, and this Court's interpretation of a materially indistinguishable provision in *Jackson*. The government fails to show otherwise.

1. The government claims that § 633a(a) only "prohibits discrimination based on the status" of an employee, not that person's conduct. Br. 9. But, when an employer retaliates because a worker complains of age discrimination, the retaliation is "based on" *both* the person's conduct (complaining about unlawful activity) *and* on "age." The retaliation is triggered not merely by the act of complaining, but by the nature of the complaint, which is directly tied to age. By con-

trast, if the same worker suffered retaliation after complaining of race discrimination, the employer's action would not be "based on age."

Thus, what the government calls the "most natural reading" of the statute, Br. 9, 14, is actually a revision of its text. On the government's view, § 633a(a) prohibits "discrimination based *solely* on an employee's status as an individual age 40 or over." But, Congress wrote a very different prohibition, broadly requiring that all personnel actions "shall be made free from *any* discrimination based on age." 29 U.S.C. § 633a(a) (emphasis added).

Indeed, Congress modeled this broad prohibition directly on § 717(a) of Title VII, *Lehman* v. *Nakshian*, 453 U.S. 156, 167 n.15 (1981), which proscribes retaliation. Congress made clear that § 717(a) prohibits retaliation clear by expressly including a private-sector remedy for reprisals among the remedies for violations of § 717(a). See Ptr. Br. 19-20. Moreover, as this Court has recognized, one of the reasons Congress adopted Title VII's federal-sector provisions was because it found that fear of retaliation had rendered earlier administrative protections against federal-sector discrimination ineffective. See *Brown* v. *GSA*, 425 U.S. 820, 825-26 (1976) (noting Congress's finding that federal employees did not invoke administrative remedies "'for fear that doing so will only result in antagonizing their supervisors and impairing any future hope of advancement'") (quoting S. Rep. No. 92-415, at 14 (1971)). The government itself effectively concedes that § 717(a) prohibits retaliation.[1]

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[1] The government attempts to limit its concession, Br. 39 n.11, but because § 633a(a) was modeled directly on § 717(a), the latter's scope is inescapably at issue here. Accordingly, to respond to petitioner's agument, the government had to show that

Because the language of § 717(a) is replicated *in haec verba* in § 633a(a), the two provisions have the same meaning, *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 120-21 (1985) (applying principle to other ADEA provisions copied from Title VII), absent "compelling evidence" to the contrary. *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 746, 754 (1988) (applying principle to "nearly identical" labor provisions). Thus, § 633a(a), like § 717(a) of Title VII, prohibits retaliation.[2] The government's "contextual" evidence does not remotely show that Congress intended § 633a(a) to be narrower than the Title VII ban from which it was derived.

In contending otherwise, the government deems it significant that Title VII's federal-sector remedial scheme incorporates Title VII's private-sector remedies, while the ADEA's federal-sector remedial scheme does not incorporate the ADEA's private-sector remedies. Br. 37-39. But it simply does not follow from this that § 717(a) bars retaliation while § 633a(a) does not. Title VII's remedial scheme merely makes clear (by incorporating a retaliation-related remedy) that § 717(a) bars retaliation. The incorporation of this private-sector retaliation remedy, however, did not *add* retaliation to § 717(a)'s substantive scope—that proscription was already there, in § 717(a)'s broadly worded general discrimination ban. By using § 717(a)'s language to outlaw federal-sector age discrimination, Congress necessarily incorporated this same meaning into § 633a(a). The fact that Congress authorized "such legal or equi-

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§ 717(a) does not encompass retaliation. The government did not.

[2] This conclusion is reinforced by the fact that the CSC had interpreted § 717(a) to bar retaliation before Congress copied its language in § 633a(a). Ptr. Br. 21-24. *See also infra* at 21-22.

table relief as will effectuate the purposes of" the ADEA's federal-sector prohibition, 29 U.S.C. § 633a(c), is plainly not evidence that Congress meant to exclude retaliation from § 633a(a). To the contrary, this language is identical to § 626(c), see *id.* § 626(c)(1), which authorizes relief in civil actions to enforce the ADEA's private-sector provisions, including the express ban on retaliation.[3]

Section 633a(f) likewise reveals no intent to exclude retaliation from § 633a(a). The addition of this provision in 1978 rendered § 633a(a) "self-contained and unaffected by other sections" of the ADEA. *Lehman*, 453 U.S. at 168. It did not change the meaning Congress had given § 633a(a) four years earlier by copying the language of § 717(a).

Title VII's federal-sector discrimination ban also refutes two of the government's other "plain language" arguments. First, § 717(a) shows that Congress does *not* invariably use the language found in § 623(d) of the ADEA and § 704(a) of Title VII to prohibit retaliation, as the government repeatedly claims. Br. 15-18. Instead, like § 633a(a), § 717(a) uses a general ban to prohibit retaliation. And, Title VII shows that it would not be anomalous for Congress to protect private but not federal employees from retaliation outside the workplace. *Id.* at 16. If § 633a(a)'s protection from retaliation is so limited—a question not presented here—then this is equally true of § 717(a), which is also limited to "personnel actions," 42 U.S.C.

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[3] By contrast, differences in *substantive* provisions led the Court to conclude that the ADEA's private-sector prohibitions are in certain respects narrower than Title VII's private-sector provisions. *Smith* v. *City of Jackson, Miss.*, 544 U.S. 228, 236 n.6, 240-41 (2005).

§ 2000e-16(a).[4] The fact that retaliation protections may not be exactly co-terminous in the private and federal sectors is thus not anomalous, and is certainly not evidence Congress intended to leave federal workers with no judicial remedy for *any* retaliation.

Indeed, it is the government's reading that creates anomalies. In light of Title VII's protections, the government's position is that Congress afforded federal workers a judicial remedy for retaliation triggered by complaints of discrimination based on race, color, religion, sex, and national origin but *not* age. The government cites no evidence, textual or otherwise, that Congress intended to single out older workers for such disfavored treatment.

2. Section 633a(a)'s plain meaning is also confirmed by this Court's determination that Title IX "clearly prohibit[s] retaliation for complaints about" unlawful discrimination. *Jackson*, 544 U.S. at 178 n.2. The Court "reach[ed] this result based on [Title IX's] *text*," *id.* at 178 (emphasis added), which is materially indistinguishable from (and indeed, in some respects narrower than) the text of § 633a(a). The government does not—and cannot—identify any textual differences in the substantive prohibitions of

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[4] Arguably, because § 704(a) reaches retaliation outside work, *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006), the incorporation of remedies for violations of § 704(a) in Title VII's federal-sector remedial provisions shows that § 717(a) also bars non-workplace retaliation. If so, for the reasons discussed above, § 633a(a) would include the same protection. Nor is it clear that the government is correct in arguing that § 633a(a) does not bar retaliation against younger workers. Br. 15. Retaliation against a 35-year old employee who corroborates a 60-year old's age discrimination claim would "affect" older workers by deterring others from testifying on behalf of other workers who complain of age discrimination.

§ 633a(a) and Title IX that explain why the latter bars retaliation, but the former does not.

Instead, having argued that the plain language of Title IX prohibits retaliation,[5] the government now contends, in effect, that the Court distorted the statute's meaning due to policy concerns. It claims the Court exercised "latitude" it possesses when shaping a remedial scheme for an implied cause of action to ensure that Title IX's enforcement scheme did not unravel. Br. 23. This claim is meritless.

This Court cited concerns over the efficacy of Title IX's enforcement scheme in a separate part of its opinion addressing *who* could bring a retaliation claim, not whether Title IX barred retaliation *vel non*. *Jackson*, 544 U.S. at 180-81. More fundamentally, while courts have latitude to shape *remedies* under statutes enforced through implied rights of action, they cannot alter the *substantive prohibitions* of such statutes. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (in implied right of action, "the text of the statute controls" where the issue is "the scope of conduct prohibited").[6] *Jackson* simply interpreted the scope of

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[5] Brief of the United States as *Amicus Curiae* Supporting Petitioner at 5, 8-9, in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005) ("U.S. *Jackson* Br."). The government's qualification that "a general nondiscrimination provision does not *invariably* encompass" retaliation because "[o]ther relevant indicators of statutory intent *could* show that retaliation is *categorically excluded*," *id.* at 10 n.1 (emphases added), confirms that broad discrimination bans *do* prohibit retaliation, absent affirmative evidence to the contrary—evidence that does not exist here.

[6] In *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274 (1998), the school district conceded Title IX had been violated. *Id.* at 298 n.7 (Stevens, J., dissenting) (citing respon-

Title IX's substantive proscription, and its textual analysis is fully applicable here.[7]

In short, the plain language of § 633a(a), the historical derivation of that language, and this Court's decision in *Jackson* confirm that § 633a(a) prohibits retaliation.

B. The Government's "Contextual" Arguments Provide No Justification For Narrowing § 633a(a)'s Scope.

1. The government principally argues that the explicit bar on retaliation in § 623(d) demonstrates that Congress chose not to prohibit retaliation in the federal sector. Br. 9-11, 16-19, 22-23, 25-26. This "negative inference" theory, however, ignores the fundamentally different structures of the ADEA's private- and federal-sector prohibitions, and thus rests on a logical fallacy. A strong inference that § 633a(a) does not prohibit retaliation would arise if Congress had modeled § 633a(a) on *§ 623(a)*, then failed to include any federal-sector analogue to § 623(d). But no such inference can be drawn here, where Congress chose

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dent's brief). The Court exercised its "latitude" not to alter the scope of the statute's prohibition, but to deny a damages remedy where school officials lacked notice of the violation. *Id.* at 284-90.

[7] The Court bolstered that textual analysis by observing that it was proper to presume that the 1972 Congress that enacted Title IX was aware of how this Court had construed 42 U.S.C. § 1982 in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and would have expected Title IX's discrimination ban to be interpreted in the same manner. *See Jackson*, 544 U.S. at 176-77. That same presumption applies here. Because substantive prohibitions are interpreted in the same manner regardless of how they are judicially enforced, the 1974 Congress would have expected § 633a(a)'s substantive to be given the same broad scope as § 1982's comparable ban, even though the latter is enforced through an implied cause of action.

instead to outlaw federal-sector age discrimination using a general discrimination ban, rather than the detailed enumeration ban it used for the private sector.

Indeed, in *Jackson*, the government itself recognized the structural differences between Title VII's private-sector provisions, which set forth "a series of prohibitions . . . that specify in great detail the kind of discrimination prohibited," and Title IX's "single general prohibition." U.S. *Jackson* Br. 21. The government explained that Congress's decision to include an express retaliation ban in Title VII but not Title IX did *not* demonstrate that Title IX failed to bar retaliation. *Id.* This Court agreed. In words equally applicable to § 633a(a), it ruled that, "[b]ecause Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." *Jackson*, 544 U.S. at 175.

The government claims this case is different because it seeks to draw a negative inference by comparing "different provisions *within* a statute." Br. 22. But *Jackson* rejected the comparison of Title IX and Title VII's private-sector provisions not because it was *inter*-statutory, but because the statutes were fundamentally different in structure and wording. The same is true here: the ADEA's private-sector provisions "were derived *in haec verba* from" the Title VII private-employer provisions at issue in *Jackson*, see *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978), while § 633a(a), like Title IX, is a "broadly written general

prohibition on discrimination." *Jackson*, 544 U.S. at 175.[8]

The fact that Congress extended the ADEA's private-sector provisions to state but not federal employers, Br. 22, is equally irrelevant. This shows only that Congress intended to attack age discrimination in the federal sector using a different statutory regime. The scope of that separate regime depends on the language of § 633a(a), not on comparisons with the very different language Congress used to regulate state employers.

Nor does it matter that here, unlike *Jackson*, the government seeks to compare statutes with express causes of action. Br. 23. The Court noted in passing that Title IX, unlike Title VII, was enforced through an implied cause of action. *Jackson*, 544 U.S. at 175. But, in refusing to narrow Title IX's scope, the Court relied on the differences in the structure and wording of the substantive proscriptions of the two statutes, not their mode of judicial enforcement. See *id.* (refusing to draw inference from Title IX's failure to mention retaliation because it does "not list any specific discriminatory practices") (emphasis omitted).

The government again argues that discrimination bans are interpreted differently depending on whether they are enforced through an implied or an express cause of action. Br. 23-24. But, as noted above, this is flatly incorrect. Indeed, in *Jackson*, the

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[8] The government's "same statute" distinction is also at odds with its recognition that Congress intended "to separate" the ADEA's federal- and private-sector prohibitions by enacting a "self-contained provision governing federal-sector employment." Br. 9, 2; *see also id.* at 24-25. The ADEA's distinct, self-contained regimes for the private and federal sectors are functionally equivalent to two separate statutes.

Court explained that "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within *the statute's prohibition of intentional discrimination*," *Jackson*, 544 U.S. at 178 (emphasis added)—not because the Court had "latitude" to decide what the statute's prohibition should cover. Thus, the Court's reasons for refusing to draw negative inferences based on a comparison of disparate statutes in *Jackson* are equally applicable here.

The cases the government cites to support its negative-inference theory demonstrate why it is inapplicable. The Court drew negative inferences in *Russello* v. *United States*, 464 U.S. 16 (1983), and *Rodriguez* v. *United States*, 480 U.S. 522 (1987), based on disparities in otherwise nearly *identical* provisions.[9] And the Court did the same thing in *Lehman*. Comparing § 7(c) and § 15(c) of the ADEA, which authorize suits by private and federal workers, respectively, the Court observed that, "[w]ith the exception of the express right to jury trial conferred by § 7(c)(2) and of the proviso in § 7(c)(1), *§ 7(c) is identical to § 15(c)*." *Lehman*, 453 U.S. at 158 n.6 (emphasis added). Contrary to the government's contention, Br. 19 n.2, this observation was central to the Court's rationale. It was the fact that "[s]ection 15 *contrasts* with § 7(c) of the Act" that "demonstrated that [Congress] knew how to provide a statutory right to a jury trial when

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[9] *See Russello*, 464 U.S. at 23 (forfeitures not limited to interests in an "enterprise" because another subsection referred to an interest in . . . *any enterprise*," while forfeiture provision referred to "any interest" acquired in violation of the statute) (emphasis added); *Rodriguez*, 480 U.S. at 525 (statute mandating minimum additional sentence for certain felonies did not supersede authority to suspend execution of sentences because statute expressly overrode suspension authority in other specified situations).

it wished to do so," *Lehman*, 453 U.S. at 162 (emphasis added), and that "contrast" lay in the differences between the otherwise identical terms of § 7(c) and § 15(c). Nothing in *Lehman* supports drawing a negative inference here, where the structure of the provisions at issue differ so radically.[10]

Finally, under the government's misguided analysis, the fact that § 623 expressly bars age-discriminatory job notices is "overwhelming" evidence, Br. 24 n.4, that Congress excluded such a ban from § 633a(a). But this is plainly wrong. As petititoner has shown, such a prohibition is superfluous in light of § 633a(a)'s broad language. Ptr. Br. 42. This same logic, which the government fails to dispute, demonstrates that Congress did not list retaliation in § 633a(a)'s general prohibition because such a prohibition was also superfluous, not because Congress meant to exclude such a prohibition.

2. Section § 633a(f) is equally irrelevant. The government argues that, because this provision renders § 633a self-contained, it is improper to "engraft" or "import[]" a "new substantive cause of action" into § 633a. Br. 25. But, recognizing that § 633a(a)'s general discrimination ban prohibits reprisals or discriminatory job notices does not import any of the ADEA's private-sector provisions into § 633a; it simply gives effect to the broad age-discrimination ban Congress adopted for the federal sector.

Nor do the "origins" of § 633a(a) or the 1974 amendments to the Fair Labor Standards Act ("FLSA")

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[10] Nor does *Burlington Northern* support such a conclusion. There, the Court relied on differences in equally detailed provisions that are part of the same private-sector regime to conclude that § 704(a) reached conduct outside the workplace. 126 S. Ct. at 2411-12.

show that Congress excluded retaliation from § 633a(a). The government argues that, because Congress subjected states but not the federal government to the ADEA's private-sector provisions in 1974, that same Congress was "undoubtedly aware" that § 633a "did not include text similar to the prohibition on retaliation in Section 623(d)." Br. 25-26. Similarly, the government contends that Congress's decision that same year to subject the federal government to the FLSA, which includes an express retaliation ban, is supposedly "another indication that Congress did not want to" protect older federal employees from retaliation. *Id.* at 26-27.

But these arguments ignore the fact that § 633a(a) is a general discrimination ban modeled on § 717(a) of Title VII. Congress was "undoubtedly aware" that § 717(a), enacted just two years earlier, prohibits retaliation, and that in *Sullivan*, decided just a few years earlier, this Court had construed another general discrimination ban to include retaliation. Once again, Congress's choice of a general rather than an enumeration ban is not evidence that it meant to deny protection from retaliation.[11]

C. The Government's Speculation Concerning Administrative Remedies Does Not Demonstrate That § 633a(a) Fails To Bar Retaliation.

The government's reliance on the manner in which Congress and the Executive Branch addressed re-

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[11] The FLSA is another enumeration statute, and its prohibitions (which establish minimum wages or maximum work hours) cannot possibly be understood to encompass retaliation. *See* 29 U.S.C. § 206 (minimum wages); *id.* § 207 (maximum hours). Thus, Congress had to ban retaliation expressly in the FLSA in order to outlaw such conduct.

taliation in federal employment is both misplaced and misleading. Indeed, its arguments rest on unsupported speculation about why Congress might have excluded retaliation from § 633a(a), not evidence that it actually did so, and lead to utterly implausible results.

The government does not dispute that, in 1974, general personnel regulations provided remedies only for "adverse actions," Ptr. Br. 27-28, which did not include the most common forms of retaliation. See Br. of the National Treasury Employees Union as *Amicus Curiae* 7-9 ("NTEU Br."). Nor does the government dispute that the revised antidiscrimination regulations the CSC issued in 1972, after Congress amended Title VII, did not apply to age discrimination. Ptr. Br. 26. Nevertheless, the government hypothesizes that Congress "reasonabl[y] expect[ed]" the CSC to extend these regulations, and their antiretaliation protections, to complaints of age discrimination, Br. 33. Quoting extensively from *Bush* v. *Lucas*, 462 U.S. 367 (1983), the government urges the Court to "respect[]" this presumed judgment. Br. 29.

In stark contrast to *Bush*, however, the issue here is not whether the Court should *create* "new rights and remedies," *id.*, but whether Congress "categorically excluded" retaliation from a broadly worded general discrimination ban. U.S. *Jackson* Br. 10 n.1. Observations about what Congress "was entitled to consider" and guesses about what its actions "presumably reflect," Br. 29, 33, is not evidence of congressional intent at all. Such speculation, therefore, is plainly not compelling evidence that Congress intended § 633a(a)'s general prohibition to be significantly narrower than the Title VII model from which it was derived.

In fact, the government's musings are groundless. First, if § 633a(a) did not proscribe retaliation, the CSC would not have extended the antiretaliation protections of the then-extant antidiscrimination regulations to age-based retaliation. Those antiretaliation protections were based on Title VII. The CSC had revised those regulations in 1972 "to implement" the amendments to Title VII, 37 Fed. Reg. 22717 (Oct. 21, 1972), and it had adopted new antiretaliation protections only for discrimination claims, *id.* at 22,723 (§ 713.262),[12] which did not include discrimination based on age. See Ptr. Br. 26. Other reprisals could not be challenged unless they constituted "adverse actions." *Id.* at 27-28. Thus, because the antiretaliation protections of the antidiscrimination regulations were based on Title VII, which does not reach age discrimination, Congress could not have expected that the CSC would extend those protections to age-based retaliation unless § 633a(a) reached such conduct.

Second, the government's speculation is fatally undermined by its concession that Title VII's federal-sector discrimination ban prohibits retaliation. If concerns over "efficiency" led Congress to relegate age-based retaliation claims to an administrative process, why did it provide a judicial remedy for retaliation claims based on virtually all other types of discrimination? The government offers no explanation for such an arbitrary and unfair distinction, and

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[12] Previously, the antidiscrimination regulations, like the general personnel regulations, had simply provided that "the complainant shall be free from . . . reprisal," but provided no remedy. *See* 5 C.F.R. 713.214(b) (1972).

cites no evidence Congress intended to deny a judicial remedy only for age-based retaliation claims.[13]

Nothing in the CSRA shows that Congress intended such a bizarre scheme. Enacted in 1978, the CSRA sheds no light on the intent of the 1974 Congress. Nor was it related to the 1978 amendments to the ADEA, Br. 3-4, which were passed six months earlier.[14] The government cites nothing in the text or legislative history of either enactment to show that Congress intended the CSRA to codify the exclusive means of redrssing retaliation under the ADEA. Instead, Congress expressly preserved pre-existing remedies under the ADEA, including the right to sue in federal court. See 5 U.S.C. § 2302(d) (CSRA "shall not be construed to extinguish or lessen . . . any right or remedy available to any employee or applicant for employment in the civil service under . . . sections [631] and [633a] of the [ADEA]").

Indeed, reliance on the CSRA only heightens the incongruities of the government's position. The government does not dispute that, under the CSRA, employees lack control over whether most retaliatory acts can be challenged at all (and have no right to judicial review if they are not), NTEU Br. 14-20, or that many federal workers covered by the ADEA have no remedies under the CSRA, *id.* at 20-24. In addition, the government notes that the Congressional Accountability Act ("CAA") and the Presidential and

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[13] Moreover, bifurcating claims of age discrimination and retaliation is actually inefficient for the government. NTEU Br. 24-25.

[14] *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (passed April 6, 1978); Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (passed October 13, 1978).

Executive Office Accountability Act ("PEOAA") extended the ADEA's federal-sector protections to congressional employees and employees in the Executive Office of the President, 3 U.S.C. § 411(c)(1), which includes a host of sensitive policy-making positions. See, *e.g.*, 50 U.S.C. § 402(a), (c) (National Security Council and its staff). Moreover, the government contends, erroneously, that Congress chose to supplement the ADEA's protections for these employees with an express retaliation ban. Br. 36 n.10.[15] Thus, according to the government's mistaken view, Congress protected federal workers from retaliation triggered by complaints of discrimination barred by Title VII, but chose, for age-based retaliation, to give some workers (those covered by the CAA and PEOAA) a judicial remedy; others (covered by the CSRA) a severely restricted administrative remedy; and others

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[15] Contrary to the government suggestion, the provisions it cites from the CAA and PEOAA (3 U.S.C. § 417(a); 2 U.S.C. § 1317(a)) do not show that the ADEA generally fails to prohibit retaliation. These provisions made it unlawful to retaliate for the exercise of rights under *several* laws extended to such employees. *See* 2 U.S.C. § 1302(a) (listing laws); 3 U.S.C. § 402 (same). Most of these laws bar retaliation, either through a general ban, such as § 717(a) of Title VII and § 633a(a), or an express prohibition. *See, e.g.*, 29 U.S.C. § 2615 (Family Medical Leave Act). But at least one, the Worker Adjustment and Retraining Notification Act, does not include a retaliation ban. Such indisputable over-inclusiveness by later Congresses is not show evidence that the 1974 Congress omitted a retaliation ban from § 633a(a). *See Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839-40 & nn.14-15 (1988) (redundancy caused by subsequent amendment does not control scope of initial enactment); *Oneida Indian Nation* v. *County of Oneida, N.Y.*, 414 U.S. 661, 680-81 n.15 (1974) (duplicative provision simply made "assurance doubly sure").

still (who fall outside the CSRA) no remedy at all.[16] Vague invocations of "conflicting policy considerations," Br. 35 n.8, cannot possibly explain this utterly bizarre patch-work response to retaliation.

In particular, it does not explain why Congress would leave some covered employees completely remediless if they suffer retaliation. As the government itself has recognized, U.S. *Jackson* Br. 5, 13, and Congress's own actions make clear, Ptr. Br. 25, a remedy for retaliation is essential to ensure that a discrimination ban is effective. Clearly, Congress balanced conflicting policy considerations by excluding some workers from the ADEA altogether, not by selectively denying some covered workers protection from retaliation.

D. Agency Interpretations Confirm That § 633a(a) Bars Retaliation.

Consistent and authoritative agency interpretations confirm that § 633a(a) bars retaliation. The revised antidiscrimination regulations implementing the 1972 amendments to Title VII provided that an allegation of reprisal could be "reviewed as an individual complaint of discrimination," 37 Fed. Reg. at 22,723 (§ 713.262(a)), and the CSC extended these regulations to age discrimination after passage of

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[16] Most postal workers fall into this last category. *See* NTEU Br. 23-24. The government tries to plug this gap by noting that many are covered by collective bargaining agreements, and all are covered by the *Postal Service Manual*. Br. 36-37. As petitioner has explained, however, these alternatives provide only the most limited forms of protection from retaliation. Ptr. Br. 28 n.6; *see also* NTEU Br. 23-24. Moreover, as the NTEU has explained, there are thousands of other federal employees who have no protection against age-based retaliation under any alternative administrative scheme or collective bargaining agreement. NTEU Br. 21-23.

§ 633a(a). 39 Fed. Reg. 24,351 (July 2, 1974). This language is not merely procedural and does not treat discrimination and retaliation as "distinct." Br. 41-42. The CSC did not provide that reprisal claims were to processed in "accordance with the procedures governing" discrimination claims. Instead, it provided that they were to be reviewed *as* complaints of discrimination.

This is confirmed by the substance of the regulations themselves. As just explained, the 1972 revised antidiscrimination regulations were adopted "to implement" Title VII itself. They went beyond the existing—and largely unenforceable—"assurance" against reprisals, and authorized complaints about, and remedies for, all forms of retaliation triggered by complaints of then-unlawful discrimination, not merely the rare reprisals that constituted "adverse actions." The CSC thus necessarily determined that Title VII (and later § 633a(a)) barred retaliation as a form of proscribed discrimination. And, the remedies set forth in these regulations drew no distinctions between charges of discrimination and retaliation. See 5 C.F.R. § 713.271 (1973).

The current EEOC regulations are clear on this point. They do more than merely state a "[g]eneral policy" barring retaliation against persons "for opposing any practice made unlawful by" various statutes, including § 633a(a), 29 C.F.R. § 1614.101(b). They also state that "[c]omplaints alleging retaliation *prohibited by these statutes* are considered *to be* complaints of discrimination for purposes of this part," *id.* § 1614.103(a) (emphases added). The government ignores the first half of the latter provision, which does purport to construe § 633a(a). Moreover, this provision is not merely procedural ("this part" refers to federal-sector discrimination generally, not the pro-

cedures for handling complaints), and plainly deems retaliation "to be" a form of prohibited discrimination. Indeed, the government's arguments to this Court are flatly contradicted by its position in *Villescas* v. *Abraham*, 311 F.3d 1253 (10th Cir. 2002), where it accepted that § 633a(a) bars retaliation "pursuant to regulations issued by the EEOC." *Id.* at 1258.

E. Sovereign Immunity Provides No Basis For Concluding That § 633a(a) Fails To Prohibit Retaliation.

Finally, sovereign immunity principles are inapplicable to the statutory construction issue here. And even if they applied, the plain language and historical derivation of § 633a(a) show that Congress clearly prohibited retaliation triggered by a complaint of age discrimination.

Contrary to the government's claim, subsections (a) and (c) of § 633a do not jointly define the scope of the government's waiver. Br. 44-45. Subsection (a) sets forth a substantive norm, while subsection (c) waives immunity "for such legal or equitable relief as will effectuate the purposes of the ADEA. 29 U.S.C. § 633a(c). Rules of strict construction apply to subsection (c), and require courts to decide whether certain types of relief (*e.g.*, damages for emotional distress) are appropriate to redress violations of the statute's substantive norm (*i.e.*, that such legal relief "will effectuate the purposes" of the Act). But those rules do not apply to and limit the statute's substantive norm itself, which is found in subsection (a). Indeed, the government recognized this very distinction in *Villescas*, where it accepted that a covered federal employee could bring a claim for retaliation, but argued that sovereign immunity barred the relief of compensatory damages for emotional distress. 311 F.3d at 1258.

This distinction, moreover, is confirmed by this Court's cases applying the Indian Tucker Act. Under that statute, the United States has consented to be sued for claims "arising under the Constitution, laws or treaties of the United States," 28 U.S.C. § 1505, and the "rights-creating source of substantive law" that gives rise to such claims is not subject to the rules of strict construction applicable to the waiver of sovereign immunity itself. See *United States* v. *Navajo Nation*, 537 U.S. 488, 503 (2003) ("rights-creating statute or regulation need not contain 'a second waiver of sovereign immunity'") (quoting *United States* v. *Mitchell*, 463 U.S. 206, 218-19 (1983)). Instead, the rights-creating statute is subject to a "'fair interpretation'" standard, which requires "a showing demonstrably lower than the standard for the initial waiver of sovereign immunity" itself. *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) So too here, Congress has waived immunity to a civil action brought by "[a]ny person aggrieved," 29 U.S.C. § 633a(c), and the "rights-creating source of substantive law" that determines whether a person is "aggrieved"—subsection (a)—is not subject to the rules of strict construction.

By contrast, the government argues that sovereign immunity principles entitle courts to decide for themselves whether the purposes of § 633a of the ADEA would be "effectuated" if its substantive prohibition encompasses retaliation. Br. 44. Tellingly, however, the government identifies no case in which this Court has used sovereign immunity principles to narrow a substantive norm based on such judicial policy-making. Certainly, *Lehman* is not such a case; it simply interpreted subsection (c) of § 633a, not sub-

section (a). 453 U.S. at 162-68.[17] Nor does the government dispute that the "double-narrowing" it seeks would render the EEOC's *Chevron*-style interpretive authority illusory and would require a more stringent construction of Title VII's analogous discrimination ban than the ineffective regulatory ban Congress sought to replace. Ptr. Br. 50-51. These unexplained anomalies confirm that it is improper to narrow substantive norms based on sovereign immunity concerns.

In all events, § 633a(a) contains the necessary clear statement. As petitioner has explained, *id.* at 47 & n.18, this Court stressed that the materially indistinguishable language of Title IX "clearly" prohibited retaliation and thus satisfied an equally stringent clear statement rule. Indeed, the language of § 633a(a) is even broader in scope than Title IX's, and the clarity of its prohibition against retaliation is compelled by its derivation from Title VII's federal-sector discrimination ban and the proximity of its enactment to *Sullivan*, both of which make clear that the 1974 Congress would have plainly understood the phrase "discrimination based on age" to include a ban on retalia-

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[17] Similarly, *United States* v. *Mitchell*, 445 U.S. 535 (1980), is part of the line of cases that established the "fair interpretation" standard for rights-creating statutes that give rise to claims under the Indian Tucker Act. *See White Mountain Apache Tribe*, 537 U.S. at 472-73. *Lane* v. *Pena*, 518 U.S. 187 (1996), held that the Rehabilitation Act does not waive immunity for monetary damages. *Id.* at 192-94. In *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992), the Court held that a provision of the bankruptcy code waives immunity for declaratory and injunctive relief but not for money damages. *Id.* at 34-37. And in *Irwin* v. *Department of Veteran Affairs*, 498 U.S. 89, 94-96 (1990), the Court interpreted § 717(c) of Title VII, not its substantive prohibition, § 717(a), in determining that equitable tolling applies in Title VII suits brought against the federal government.

tion. The government's attempt to create ambiguity based on inapposite comparisons to other provisions or speculation about Congress's intent cannot show otherwise.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, the judgment of the First Circuit should be reversed.

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No. 06-1321

IN THE SUPREME COURT OF THE UNITED STATES

MYRNA GOMEZ-PEREZ,
Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,
Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the First Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce such rights. Almost half of AARP's more than 39 million members are in the work force, and many of them work in various states across the nation as federal employees. AARP's working members, including those in the federal work force, are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, and as well as by other federal and state employee rights laws. Vigorous enforcement of the ADEA, Title VII and other workplace civil rights laws is of paramount importance to AARP, its working members, and millions of other workers of all ages who rely on such laws to deter and remedy illegal employment discrimination, including discriminatory retaliation against older workers who file ADEA claims.

SUMMARY OF ARGUMENT

The decision of the First Circuit that the ADEA does not protect federal employees from "discrimination" in the form of retaliation, and affirming summary judgment against Petitioner-Plaintiff Myrna Gomez-Perez, should be reversed because that ruling cannot be reconciled with multiple

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[1] This Brief of *Amicus Curiae* AARP in Support of Petitioner is filed with the consent of both parties. In compliance with Rule 37.6 of this Court, *amicus curiae* AARP states that no counsel for any party authored this brief in whole or in part, and further, that no party or entity other than AARP made a monetary contribution to the preparation or submission of this brief.

decisions of this Court, with the text or legislative history of the ADEA's federal-sector provision, 29 U.S.C. § 633a, or with numerous federal appellate decisions under § 633a and the federal-sector provision of Title VII, 42 U.S.C. § 2000e-16(a). Affirming the decision below would deny the federal workforce effective recourse against age discrimination, contrary to the intent of Congress.

The decision below is inconsistent with at least four decisions of this Court. In the first, *Lehman v. Nakshian*, 453 U.S. 156 (1981), the Court recognized that § 633a was modeled on § 2000e-16(a) of Title VII, which uniformly has been recognized to include a cause of action for retaliation. The second, *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), in which the Court found retaliation to be encompassed within the broad prohibition of discrimination in Title IX of the Education Amendments of 1972, is discussed in detail in Petitioner's Brief, and that discussion will not be repeated here. Third, the First Circuit's decision defies the Court's unanimous finding in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), that a robust retaliation remedy is essential to effective implementation of federal employment bias laws. The last of the four decisions, like the first, deals specifically with the rights of federal employees. This Court's ruling in *Brown v. GSA*, 425 U.S. 820 (1976), belies the Government's contention that it is sensible to conclude that Congress intended federal employees only to have a limited remedy for retaliation related to challenging age discrimination, and further, that Congress meant for federal workers only to seek such relief in proceedings separate from those available under the ADEA.

Section 2000e-16(a) of Title VII contains a broad discrimination ban, nearly identical to the ADEA's federal sector provision, § 633a, that also was enacted close in time to § 633a, as well as to Title IX.

As found by the Court in *Jackson*, at that time Congress understood that its general prohibition against discrimination included, and indeed, its effectiveness depended on, a cause of action for retaliation because of the decision establishing this principle in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Thus, in 1972, Congress embraced this approach when it enacted Title IX and § 2000e-16(a), and began work on legislation that became § 633a in 1974, based on parallel language in § 2000e-16(a).

The Court of Appeals erred in systematically undervaluing the correspondence, identified in *Lehman*, between the federal-sector provisions of the ADEA and Title VII. The court below concluded incorrectly that *Lehman's* refusal to recognize a right to trial by jury for federal employees likewise requires denying their retaliation claim. But different considerations are relevant to a right to trial by jury than are germane to the retaliation remedy Petitioner rightly claims. Similarly, the First Circuit misconstrued § 633a(f) of the ADEA as disfavoring a retaliation claim under § 633a(a). Properly understood, that provision precludes the Government's argument, also embraced by the Court of Appeals, that the private-sector provisions of the ADEA, which specifically authorize relief from discrimination in the form of reprisal, demonstrate that Congress intended to exclude such a claim from § 633a, simply because the latter only generally prohibits all discrimination on the basis of age.

This Court's decisions, as well as the text and history of Title VII and the ADEA, support the proposition that Congress intended to prohibit retaliation when it mandated that federal employees "be free from *any discrimination*" in both § 633a and § 2000e-16(a) (emphasis supplied). Federal regulations and longstanding EEOC enforcement

efforts, as well as prior litigation positions of the Government itself, all confirm this view.

Stripping a retaliation claim from § 633a would cause that law to fail its broadly-worded purpose: to protect federal workers against age discrimination in all its forms. The potential adverse impact throughout the federal work force of a decision forbidding federal-sector ADEA retaliation claims is enormous. The decision below should be reversed.

ARGUMENT

I. INTERPRETING SECTION 633a OF THE ADEA TO EXCLUDE A CLAIM FOR RETALIATION IS FUNDAMENTALLY INCONSISTENT WITH *LEHMAN V. NAKSHIAN,* WHICH IDENTIFIED THE FEDERAL SECTOR PROVISION OF TITLE VII AS THE MODEL FOR PROTECTION OF FEDERAL EMPLOYEES FROM AGE BIAS.

As originally enacted in 1967, the ADEA barred discrimination against older workers in private employment only. Then in 1974 Congress amended the definitions section of the ADEA, § 630, to include state and local government employees under the protections of § 623,[2] and also added § 633 to extend the ADEA's substantive provisions to federal employees.[3] Section 623 lists several specific forms of workplace discrimination, including discrimination against employees who oppose unlawful practices or participate in anti-discrimination proceedings: Section

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[2] *See* Nondiscrimination on Account of Age in Federal Government Employment, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 55, 78 (1974) (codified in 29 U.S.C. § 633a (2000)).

[3] *See id.* § 28(b)(2).

633a simply provides that federal employees "shall be made free from any discrimination based on age."[4]

At the Government's urging, the First Circuit found that "[t]he absence of statutory language providing a claim for retaliation in § 633a, when compared with the explicit prohibition on retaliation in § 623(d)," inexorably "leads to the conclusion that if Congress had meant to provide for both [*i.e.*, separate discrimination and retaliation] causes of action, it would have said so explicitly in § 633a." Pet. App. 5a, 8a. *See also, e.g.*, Brief for the Respondent in Opposition, *Gomez-Perez v. Potter*, No. 06-1321 (U.S. July 24, 2007) ("Opp'n Cert."), 2007 WL 2126023, at *7 (asserting that "while the ADEA's private sector provisions prohibit both discrimination ... and retaliation ..., the federal sector provision reaches only discrimination ...").

This superficial reading of § 633a relies on inapt comparisons of that law with other civil rights statutes and is at odds with multiple decisions of this Court. In particular, it clashes with key portions of *Lehman v. Nakshian*, 453 U.S. 156 (1981), the Court's most informative ruling construing § 633a, in which the Court explained that § 633a was modeled on 42 U.S.C. § 2000e-16, a nearly identical, broadly-worded

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[4] Section 633a(a) of the ADEA states, in pertinent part:

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age ... in executive agencies, ... in the United States Postal Service ..., [and in various other Federal military and civilian services], shall be made free from any discrimination based on age.

29 U.S.C. § 633a(a) (2000).

statute protecting federal employees from "any discrimination" in the workplace.

The principal effect of the Government's and court below's employment of misconceived analogies between § 633a and other laws is to unfairly diminish the relevance of this Court's two recent decisions discussing retaliation remedies. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), and *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). Finally, the Government's approach to interpreting § 633a clashes with *Brown v. GSA*, 425 U.S. 820 (1976), a major decision of this Court under § 2000e-16 of Title VII and thus, directly relevant to this case under the Court's analysis in *Lehman*. In *Brown*, the Court held that the federal-sector provision of Title VII, the model for § 633a, is a comprehensive remedial regime, not to be limited by other, parallel, federally-created avenues for relief. *Id.* at 835. It follows that § 633a is similarly comprehensive and encompasses a cause of action for retaliatory discrimination[5].

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[5] The Government also argues that, due to remedies created by other laws, § 633a "does not leave [federal employees] who complain of age discrimination without protection against retaliation." Opp'n Cert., 2007 WL 2126023, at ** 8-9. On this key point, Petitioner supplies a strong rebuttal, demonstrating the United States' failure to account for serious flaws inherent in such alternative remedies, and Congress' intent to preserve access to a retaliation claim under § 633a. *See* Brief of Petitioner at 22-28, *Gomez-Perez v. Potter*, No. 06-1321 (U.S. Nov.13, 2007) ("Br. Pet'r"). *Amicus Curiae* AARP thus does not address this issue.

A. This Court Already Has Recognized that Title VII's Federal Sector Provision, 42 U.S.C. § 2000e-16, Not the Private Sector Provisions of Either the ADEA or Title VII, Is the Proper Model for Interpreting ADEA's Federal Sector Provision, § 633a.

The First Circuit's fundamental error in this case appears in its faulty framing of the question presented: "Did Congress mean 'discrimination' and 'retaliation' when it said 'discrimination'" in § 633a of the ADEA?" Pet. App. 5a. Based on its conception of "retaliation" as distinct from "discrimination," the Court of Appeals never adequately considered the weight of authority treating "retaliation" as one of many forms of "discrimination,"and thus, as encompassed within the term "any discrimination" in § 633a. Rather, the First Circuit focused on inapt comparisons between § 633a and the private sector provisions of the ADEA and Title VII, and gave short shrift to this Court's conclusion, in *Lehman v. Nakshian*, 453 U.S. 156 (1981), that a different initial guidepost is appropriate for interpreting the meaning of § 633a: the federal-sector provision of Title VII, 42 U.S.C. § 2000e-16.

In *Lehman*, this Court considered employment discrimination claims by Alice Nakshian, "a 62-year-old civilian employee of the United States Department of the Navy," under § 633a of the ADEA. *Id.* at 158. In construing § 633a the *Lehman* Court examined the text and legislative history of the federal sector provisions of the ADEA and Title VII, and held that §§ 633a(a) and (b) of the ADEA "are patterned directly after" 42 U.S.C. §§ 2000e-16(a) and (b), "which extend Title VII protections to federal employees." 453 U.S. at 167 n.15. The *Lehman* Court specifically recognized that this correspondence extends to the substantive scope of the anti-discrimination guarantees of the two

laws.[6] Indeed, the Court acknowledged that Section 717(a) of Title VII, 42 U.S.C. § 2000e-16(a), mandates protection from employment discrimination for most federal workers in terms nearly identical to that of § 633a of the ADEA.[7]

Remarkably, the First Circuit cited this critical passage in *Lehman*, acknowledging that § 633a was modeled on § 2000e-16. The Court of Appeals also conceded that Congress intended for 42 U.S.C. § 2000e-16, the provision applicable to federal employees, to prohibit retaliation. Pet. App. 9a (citing, *e.g.*, *Ayon v. Sampson*, 547 F.2d 446, 450 (9th Cir. 1976)). Yet in doing so, the Court of Appeals failed to fully account for the weight of authority it went on to ignore. That is, the First Circuit declined to address the clear implications for § 633a of "well-settled" precedent that Title VII provides a retaliation claim for federal employees. *Rochon v. Gonzales*, 438 F.3d 1211, 1215 (D.C. Cir. 2006) (reaffirming the longstanding view[8] of the appeals court most familiar with federal employee rights litigation that Title VII

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[6] "Senator Bentsen acknowledged that '*[t]he measures used to protect Federal employees [from age discrimination]* would be substantially similar to those incorporated' in recently enacted amendments to Title VII." *Lehman*, 453 U.S. at 167 n.15 (citing 118 Cong. Rec. 24397 (1972)) (emphasis supplied).

[7] It mandates that "[a]ll personnel actions affecting employees [in most entities of the federal government] shall be made free of any discrimination" on the basis of the protected characteristics generally regulated by Title VII: race, color, religion, sex and national origin. 42. U.S.C. § 2000e-16(a). *Compare supra* n. 4.

[8] *Barnes v. Small*, 840 F.2d 972, 976 (D.C. Cir. 1988); *Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1415 & n.13 (D.C. Cir. 1985); *Clark v. Marsh*, 665 F.2d 1168, 1171 n. 1 (D.C. Cir. 1981).

protection for federal employees against "any discrimination" includes a cause of action for retaliation) (citing *Bd. of County Comm'rs, Fremont County, Colo. v. EEOC,* 405 F.3d 840, 845 (10th Cir. 2005)); *accord Afanador v. U.S. Postal Serv.*, 787 F. Supp. 261, 267 & n.11 (D. P.R. 1991), *aff'd*, 976 F.2d 724 (1st Cir. 1992); *Hale v. Marsh*, 808 F.2d 616, 619-20 (7th Cir. 1986); *Porter v. Adams*, 639 F.2d 273, 277-78 (5th Cir. Unit A 1981); *White v. GSA*, 652 F.2d 913, 917 (9th Cir. 1981).[9/]

The Court of Appeals also discussed briefly *Forman v. Small*, 271 F.3d 285 (D.C Cir. 2001). *See* Pet. App. 8a, 9a. But it failed to engage *Forman*'s explicit reasoning that *Lehman*'s analysis of the historical link between § 633a and § 2000e-16, and of their "identical language," dictates that they "should be interpreted consistently." 271 F.3d. at 297. Nor did the court below confront *Forman*'s conclusion that § 633a should be read to include a cause of action for retaliation given consistent rulings that the "sweeping language" prohibiting "any discrimination" in § 2000e-16 means that the latter "includes a claim for retaliation." *Id.* Yet that result is the logical endpoint in this case of the Court's construction of § 633a in *Lehman*.[10/]

[9/] *See also Bornholdt v. Brady*, 869 F.2d 57, 62 (2d Cir. 1989) (declining to reach issue, yet "inferr[ing]" from broad language of § 633a, requiring federal workers to "be free from any discrimination based on age," and corresponding text in Title VII, that retaliation is discrimination barred by § 633a).

[10/] *Lehman* also supports Petitioner's assertion that "the logic th[is] Court used in *Jackson* [*v. Birmingham Board of Education*, 544 U.S. 156 (2004)] to find ... a retaliation cause of action ... [in] a statute [that] prohibit[s] only 'discrimination' [*i.e.*, Title IX] is equally applicable to the ADEA." Pet. App. 6a.

Instead of following the logic of *Lehman* in construing § 633a, however, the Court of Appeals instead embarked on a seemingly random stroll through several of this Court's decisions regarding other civil rights laws. The court considered significant certain contrasts between § 633a and the private sector-provision of Title VII. Pet. App. 5a-6a (discussing *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. at 2412, and *Jackson*, 544 U.S. at 173 ("The Court specially noted this difference [between Title IX and the private sector provision of Title VII] in rejecting comparisons between Title IX and Title VII")). The First Circuit also discussed distinctions between § 633a and § 623. Pet. App. 7a-8a. And it suggested divergence between the means of enforcing Title IX and § 633a, *id.* 6a-7a, as well as § 633a and § 2000e-16 of Title VII, *id.* 9a-10a. Yet the Court of Appeals never squarely assessed the implications of *Lehman*'s analysis of the important *parallels* between the latter two statutes, or of other evidence of *correspondence* between § 633a and § 2000e-16(a). Nor did the court carefully examine *convergence* between § 633a and Title IX, strongly supported by the language of *Jackson*.[11/] This Court should avoid the unwarranted detours taken by the Court of Appeals, follow *Lehman* to its natural end, and reverse the decision below.

[11/] While the First Circuit strained to discern esoteric "contrast" between § 633a and Title IX, it dismissed offhandedly that § 633a bars "any discrimination" on the basis of age, much like Title IX bars "discrimination" based on sex.

B. Parallel Interpretation of the Federal Sector Provisions of the ADEA and Title VII Strongly Favors Recognizing that Protection from "Any Discrimination" in § 633a Includes a Cause of Action for Retaliation.

At least two important propositions flow from the close connections between the federal sector provisions of the ADEA and Title VII identified in *Lehman*. First, linkage between the two statutes, both textually and temporally, powerfully reinforces Petitioner's contention that the *Jackson* Court's conclusions regarding a Title IX retaliation claim apply with still greater force to § 633a. Second, the affinities between the statutes should dispel confusion sown by efforts of the Government and the First Circuit to compare § 633a with dissimilar, more distant relatives, such as the private-sector provisions of the ADEA and Title VII.

1. *Lehman* and *Jackson*

Lehman recounts how in 1972, during the period Congress undertook to extend Title VII to federal employees, it also began working to broaden the ADEA to cover federal workers.[12/] Later the same year, following on the heels of final enactment of a federal sector Title VII law, Congress first considered proposed revised ADEA legislation, specifically based on the Title VII amendments. In 1974, this revised

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[12/] "[The] bill introduced by Senator Bentsen on March 9, 1972, S.3318, 92d Cong., 2d Sess., 118 Cong. Rec. 7745 (1972), represented the first attempt to prohibit age discrimination in federal employment." 453 U.S. at 166 n.14.

federal-sector ADEA proposal ultimately became law as § 633a.[13/]

During this same fertile period for civil rights legislation, as this Court recounted in *Jackson*, Congress enacted Title IX. It follows from the nearly contemporaneous consideration and enactment of Title IX, § 633a of the ADEA and § 717(a) of Title VII, in the wake of *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), that the Court here should apply *Jackson*'s conclusion that the similar "context" of the early 1970's demands recognition of retaliation as part of § 633a's broadly-worded congressional prohibition of "discrimination." 544 U.S. at 176-77.

Taken together, *Lehman* and *Jackson* present a far more powerful case than either does individually that § 633a of the ADEA should be read to encompass a cause of action for retaliation. This Court's acknowledgment of an unusually clear record of congressional purpose in these decisions more than two decades apart should weigh strongly in favor of the Court ruling for Petitioner.

[13/] "Senator Bentsen subsequently submitted a revised version of his bill in the form of an amendment to pending FLSA amendments. See 188 Cong. Rec. 15894 (1972). In contrast to [his] original bill, this amendment to the ADEA proposed ... coverage of federal employees ... by the addition of an entirely new and separate section to the Act (presently § 15). [This] amendment was included in the FLSA bill reported by the Committee on Labor and Public Welfare, S.Rep. No. 92-842, pp. 93-94 (1972), and it remained in this form when the bill was enacted into law in 1974." *Lehman*, 453 U.S. at 166 n.14. *See id.* at 167 n.15 ("Sections 15(a) and 15(b) of the ADEA, as offered by Senator Bentsen and as finally enacted, are patterned directly after §§ 717 (a) and (b) of the Civil Rights Act of 1964, as amended in March 1972, see Pub. L. 92-261, 86 Stat. 111-112, which extend Title VII protections to federal employees.").

Parallels between the federal sector provisions of the ADEA and Title VII also answer misguided suggestions by the Government, and to a lesser degree the First Circuit, that *Jackson*'s comparison of Title IX and the *private sector* provisions of Title VII renders *Jackson* inapplicable to § 633a. At the Petition stage, the Government argued

> Petitioner seeks to extrapolate from *Jackson* the rule that any prohibition against discrimination based on a particular characteristic necessarily carries with it a prohibition against retaliation against a person who complains of that ... discrimination, regardless of the statutory scheme at issue ... *Jackson*, however, ... noted that Title VII's prohibition against discrimination by private employers ... does not encompass protection against retaliation, ... a point this Court reaffirmed in *Burlington* [*Northern v. White*, 126 S. Ct. 2405 (2006)].

Opp'n Cert., 2007 WL 2126023, at *10. Yet Petitioner neither initially, nor at the merits stage, has argued for such a rule.

2. *Lehman* and *Burlington Northern*

The *Lehman* principle, that § 633a is best viewed through the lens of § 2000e-16 of Title VII, likewise refutes the First Circuit's reliance on *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), for the proposition that retaliation and discrimination are two distinct creatures, only the latter of which is prohibited by § 633a. *See* Pet. App. 5a (citing *Burlington Northern*, 126 S. Ct. at 2412). That is, there is no reason to believe Congress intended to restrict federal employees encountering retaliatory age discrimination from pursuing an ADEA claim based simply on a negative inference founded on the private sector provisions of the ADEA, much less based on such an inference

deriving from *Burlington Northern*'s analysis of the private sector provisions of Title VII. In any event, the Court of Appeals' reliance on *Burlington Northern* is especially odd given its recognition that Congress intended Title VII's federal sector provision to protect federal workers from retaliation to the same extent as Title VII's private sector provisions protect private employees. Pet. App. 9a (quoting *Ayon v. Sampson*, 547 F.2d at 450).[14]

C. Judicial Recognition of a Retaliation Claim under GERA, Another Federal Statute Protecting Federal Employees from "Any Discrimination," Favors this Court's Recognition of a Retaliation Claim under Section 633a.

The Government Employee Rights Act of 1991, or "GERA," *see* Pub. L. No. 102-66, §§ 301 *et seq.*, 105 Stat. 1088, is another law like § 633a, modeled on the federal sector provision of Title VII, and further demonstrates that the Government's cramped approach to protection from retaliation for federal employees under the ADEA threatens to disturb settled legal principles, defy Congress' intent, and disrupt sensible reliance on Title VII as a guide for interpreting federal employment bias laws.

GERA added to Title VII coverage for certain previously exempt presidential appointees, congressional staff and state employees. *See Bd. of County Comm'rs, Fremont County, Colo. v. EEOC*, 405 F.3d at 844 & n.2. Like § 633a of the ADEA and §

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[14] *Accord Hale v. Marsh*, 808 F.2d at 619; *White v. GSA*, 652 F.2d at 913. This authority further undermines drawing a negative inference regarding a § 633a retaliation claim based on § 623. If anything, Title VII precedent supports an opposite inference, that § 633a was intended to include key protections afforded by § 623, including a cause of action for retaliation.

717(a) of Title VII, GERA simply declares that "[a]ll personnel actions" affecting covered employees "shall be made free from any discrimination," without separately addressing discrimination in the form of retaliation. 42 U.S.C. § 2000e-16b(a). GERA adds, like this Court declared of § 633 in *Lehman*, that such protection shall be undertaken "within the meaning of section 2000e-16 of [Title VII]." *Freemont County*, 405 F.3d at 844. (quoting 42 U.S.C. § 2000e-16b(a)(1)). *Fremont County* upheld an EEOC rule, 29 C.F.R. § 1603.102(a), establishing that GERA encompasses a cause of action for retaliation, in furtherance of its broadly-worded purpose to protect covered employees from discrimination. *Id.* at 845. The Tenth Circuit deferred to EEOC's interpretation, *see id.* at 846-47 (applying *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)), in an analysis that calls out for reversal of the First Circuit in this case.

Fremont County found persuasive legislative record evidence that GERA, like § 633a, was "modeled after the language of [§ 2000e-16(a) of] Title VII." *Id.* at 846. Thus, the Tenth Circuit concluded, like the *Forman* court, that "to include prohibitions against retaliatory discrimination is consistent with judicial interpretations of Title VII." *Id.* The Court of Appeals cited *Jackson*, in which, it noted, this Court "interpret[ed] similar language under Title IX [and] held that because retaliation is 'intentional discrimination' ... 'retaliation falls within the statute's prohibition of intentional discrimination ... .'" *Id.* at 845 (citing *Jackson*, 544 U.S. at 167). *Fremont County* also relied on lower court rulings embracing an approach directly applicable to § 633a. *See id.* (citing *Brazoria County v. EEOC*, 391 F.3d 685 (5th Cir. 2004) for the proposition that "because § 2000e-16 bars retaliation and § 2000e-16b(a)(1) incorporates § 2000e-16, GERA makes retaliation, within the meaning of [§ 2000e-16], unlawful"); *Haddon v. Executive Residence at the White House*, 313 F.3d 1352, 1356-57 (Fed. Cir.

2002) ("It is quite sensible to conclude that Congress intended for GERA's § 2000e-16b ... to include reprisal").

Recognition of a retaliation claim under GERA further supports an inference that *Lehman* - *i.e.*, its holding that § 633a is modeled on Title VII protections for federal employees - calls for the Court to approve a federal-sector retaliation claim under the ADEA.

D. Requiring Federal Employees to Rely on Non-ADEA Retaliation Remedies Is Inconsistent with the Federal Sector Provision of Title VII, and thus, with Section 633a.

In *Brown v. GSA*, 425 U.S. 820 (1976), this Court determined that § 717 of Title VII (42 U.S.C. § 2000e-16) established an "exclusive judicial remedy for claims of discrimination in federal employment" based on protected employee characteristics covered by Title VII. *Id.* at 835. The majority opinion recounted at length Congress' conclusions that prior to the 1972 Title VII amendments, for federal employees, "administrative remedies [for workplace discrimination] were ineffective" and "judicial relief ... was even more problematic." *Id.* at 826; *see id.* at 828 ("federal employees who were treated discriminatorily had no effective judicial remedy"). *Brown* specifically noted defects in remedial efforts by the Civil Service Commission, and impediments to effective relief via causes of action "under the Administrative Procedure Act and the Mandamus Act." Id. at 826.[15] As a result,

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[15] *See Bunch v. United States*, 548 F.2d 336, 339 (9th Cir. 1977) (citing Senate Special Comm. on Aging, "Improving the Age Discrimination Law" 93d Cong., 1st Sess. 14, 17-18 (Comm. Print. 1973)) (stressing that "[t]he [federal government's] age discrimination policy like the anti-discrimination policy of Title VII, was seriously hampered

the Court held that "congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 829.[16]

While this Court need not address the issue of the ADEA's exclusivity, and its preclusion of federal employees' access to other federal statutory remedies, *Brown* supports the proposition that § 633a of the ADEA, which this Court has deemed to be based on § 717(a) of Title VII, is likewise "comprehensive" and premised on the inadequacy of remedies for employment discrimination enforced by such entities as the Civil Service Commission. It follows that like § 717(a), §633a of the ADEA should be read to encompass a cause of action for retaliation in cases of age discrimination in federal employment. *Accord Davis v. Passman*, 442 U.S. 228, 247 n.26 (1979); *Kotarski v. Cooper*, 799 F.3d 1342, 1345 (9th Cir. 1986) (Title VII retaliation claim); *White v. GSA*, 652 F.2d 913, 917 (9th Cir. 1981) (same).

E. The Government's Efforts to Diminish the Significance of the *Lehman* Principle Are Without Merit.

While *Lehman* provides critical guidance for interpreting § 633a in this case, *Lehman* is not controlling in all respects. In addition to establishing

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by the lack of any effective enforcement machinery prior to the [1974 addition of § 633]").

[16] The dissent in *Brown* challenged the notion that § 717 created an "exclusive" remedial scheme, *id.* at 838, but agreed that Congress in 1972 "enacted a comprehensive remedial statute," which, they argued, "was supplementary to [and not pre-empted by] whatever remedies might exist" under other federal or state laws, *id.* at 835.

the importance of § 2000e-16 of Title VII to construing § 633a, *Lehman* provides insight as to the meaning of § 633a(f), which the Government and the court below misread as favoring the Postal Service in this case. *See* Pet. App. 9a-10a. On the other hand, *Lehman*'s specific holding, denying federal employees' right to a trial by jury, does not assist the Court in resolving this case, notwithstanding the Government's contentions to the contrary.

In *Lehman,* the D.C. Circuit held that Alice Nakshian was entitled to a jury trial, as she would have been under the ADEA's private sector provisions. This Court then reversed. *See* 453 U.S. 18-60, 169. The Government asserts, and the court below opined, that *Lehman*'s ruling on the jury trial question should lead the Court to conclude that a retaliation remedy - which likewise is expressly referenced in ADEA's private sector provision - should not be recognized under § 663a for federal employees. This is unfounded hyperbole.

This Court concluded in *Lehman* that the jury trial entitlement afforded by the ADEA's private sector provision is not available to federal workers. But in reaching this result, the Court stressed particular considerations applicable to congressional creation of a right to a jury trial.[17] In addition, the *Lehman* Court

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[17] *See Lehman*, 453 U.S. at 161 ("When Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial"); *id.* at 162 ("The appropriate inquiry, therefore, is whether Congress clearly and unequivocally departed from its usual practice in this area, and granted a right to trial by jury when it amended the ADEA"); *accord id.* at 166-67 ("Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector, and one based not on the FLSA but as already indicated, on Title VII, where,

disavowed the reasoning advanced by the Government and the First Circuit in this case. That is, based on § 633a(f)[18] the Court declined to rule that a right to jury trial cannot be based on § 633a simply because such a right is explicitly granted by the ADEA's private sector provision, but is not mentioned in § 633a. *Lehman*, 453 U.S. at 168.

The court below concluded, and the Government here argues, that § 633a(f) precludes federal workers from asserting a retaliation claim under § 633a(a), and thus, that in this respect, the federal-sector provisions of the ADEA and Title VII many not be applied in parallel fashion as *Lehman* found to be appropriate. *See* Opp'n Cert., 2007 WL 2126023, **2, 7. This contention likewise lacks persuasive force or authoritative support.

The First Circuit erred in declaring Congress' purpose in enacting Section 633a(f) was to prevent the Act's "e*xpansive* private-sector provisions" from being "extended to federal employees." Pet. App. 10a (emphasis supplied). This Court said no such thing in *Lehman*. Indeed, the legislative report relied on by the *Lehman* Court, in discussing § 633a(f), indicates the opposite is true: that is, Congress intended to make sure protections for federal employees against age discrimination were not eroded by "[r]estrictions and limitations" set forth elsewhere in the ADEA, including in its provisions governing actions against private

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unlike the FLSA, there was no right to trial by jury" (citations omitted)).

[18] "Any personnel action of any department, agency, or other entity referred to in subsection (a) of the section shall not be subject to or affected by, any provision of this Chapter." 29 U.S.C. § 633a(f).

employers. H.R. Rep. No. 95-527, pt 1. at 11, (1977);[19] *see Lehman*, 453 U.S. at 168 (citing same).

The D.C. Circuit has correctly observed that Congress enacted § 633a(f) in 1978, under circumstances that in no way "suggest[] that it was intended to limit the broad coverage of § 633a that was originally intended." *Forman*, 271 F.3d at 298. When Congress created § 633a(a) in 1974, it "used unqualified language that encompasses a claim of retaliation because 'analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor.'" *Id.* at 296 (quoting *Siegel v. Kreps*, 654 F.2d 773, 782 n.43 (D.C. Cir. 1981)). And "the 1978 amendments imposed *more stringent* requirements upon the federal sector than the private sector," not less. *Id.* at 298 (emphasis supplied). That is, for example, "[i]n amending the ADEA in 1978, Congress eliminated the upper age limit for federal employees in order to *effectively end* mandatory retirement in the federal sector in most instances, whereas it merely increased the coverage from 65 to 70 for private employers, [thereby merely] *limiting* the protection from mandatory retirement in the private sector." *Id.* at 297 (emphasis supplied).[20]

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[19] *Accord* Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1085 n.84 (1998).

[20] The *Forman* Court likewise noted a plethora of evidence that Congress in 1974 intended to "remove discriminatory barriers" to federal employment based on age, as the ADEA "has [done] and continues to do in private employment." *Id.* at 297. Further, *Forman* explained that Congress' intent to such effect applied "the same reasoning" federal appeals courts had "relied upon in holding that [42 U.S.C. §] 2000e-16, in which Congress waived sovereign immunity for claims under Title VII, includes a claim for retaliation." *Id.* (citations omitted).

Section 633a(f) neither contains nor implies by its presence anything that would preclude recognition of a federal-sector retaliation claim under the ADA. If anything it strongly favors this Court's approval of such a cause of action.[21/]

II. THIS COURT'S RECOGNITION THAT A REMEDY FOR REPRISAL IS INTEGRAL TO EFFECTIVE PROTECTION FROM EMPLOYMENT DISCRIMINATION STRONGLY FAVORS PETITIONER'S RETALIATION CLAIM.

In Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006), the Court made clear in numerous ways that a cause of action for retaliation is essential to effective enforcement of an employment discrimination statute. Its reasoning applies to all employees covered by Title VII, including both private and federal (as well as other non-federal) workers.

In particular, the *Burlington* Court explained that "broad protection from retaliation helps assure the cooperation" of employees "willing to file complaints and act as witnesses," and it is this "cooperation upon which accomplishment of [Title VII's] primary objective depends." *Id.* at 2414. Further, this Court *unanimously* stressed the importance of retaliation claims to "'unfettered access' to Title VII's remedial

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[21/] The Government also asserts that § 633a(f) "specifies that none of the provisions governing private employers shall apply to federal employers." Opp'n Cert., 2007 WL 2126023, at *7. Obviously, Congress could not have intended that federal and non-federal employees would be governed by completely different - as opposed to separate - anti-discrimination regimes. Thus, for example, the Government surely does not dispute that the federal-sector provision of the ADEA bans "discrimination" on the basis of age in "hir[ing]" and "discharg[ing" older federal workers, even though such forms of bias only are specifically prohibited by § 623 and not § 633.

mechanisms." *Id.* at 2415 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)). The Court ruled that Title VII's private-sector retaliation provision covers conduct other than "employment-related" actions constituting independent Title VII violations because – in words equally applicable to § 633a of the ADEA – "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. 'Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.'" 126 S. Ct. at 2414 (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)). The *Burlington* Court also explained that "[a] reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former," and that, absent effective protection, "fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Id.* at 2417-18.

It is inconceivable that Congress did not believe that such considerations were equally applicable to the federal workforce. Thus, the decision below cannot be reconciled with *Burlington*'s consensus that an anti-retaliation claim serves a vital purpose in giving effect to anti-discrimination laws such as the ADEA.

The *Jackson* Court also recognized that "effective protection" from discrimination requires protection from retaliation, because "without protection against retaliation, the underlying discrimination is

perpetuated." 544 U.S. at 180 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)).[22] This ruling approved the reasoning relied on by the D.C. Circuit in *Forman v. Small*: that unless retaliation is prohibited, federal employees remain vulnerable to retribution for voicing concerns about workplace bias. 271 F.3d at 297. The First Circuit's contrary view would vitiate the ADEA's purpose to "remove discriminatory barriers against employment of older workers in government jobs." *Id.* (quoting S. Rep. No. 93-690, at 56 (1974)). The First Circuit rashly discounted this critical aspect of § 633a, and thereby left federal employees vulnerable to age bias at work.

Congress enacted § 633a of the ADEA as a bulwark against "'age-ism'. . . as great an evil in our society as discrimination based on race or religion[. . .]." H.R. Rep. 93-913, at 2850 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2811. A claim for retaliation is not only an *inherent* part of § 633a's general ban on "discrimination," but also an *essential* component of Congress' plan to create fully effective recourse against age bias in federal employment. Eliminating retaliation from § 633a would thwart Congressional intent to provide protection from age bias for federal employees as effective as the safeguards afforded under § 623 and both the private-sector and federal-sector provisions of Title VII.

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[22] This Court further explained: "if retaliation were not prohibited, Title IX's enforcement scheme would unravel" because "[w]ithout protection from retaliation, individuals who witness discrimination would likely not report it, [deliberate] indifference claims would be short-circuited, and the underlying discrimination would go unremedied." *Id.* at 180-81.

III. THE GOVERNMENT'S OWN POLICIES, PRACTICES AND POSITIONS CONTRADICT THE ASSERTION THAT FEDERAL EMPLOYEES LACK A RETALIATION CLAIM UNDER THE ADEA.

It is incomprehensible that the United States can embrace a consistent policy, for over three decades, authorizing federal employees to sue for retaliation in violation of § 633a's pledge of protection against "any discrimination," and then suddenly discover, based on no apparent intervening change in law or fact of any consequence, a hole in the same statute precluding such a remedy. It simply defies understanding that such an about face can be undertaken consistent with the Government's duty to enforce in good faith laws enacted by Congress. Yet that is what the Government has done and proposes this Court to ratify. Given the scope and variety of the Government's legal pronouncements articulating and ratifying its view that § 633a encompasses a cause of action for retaliation, this Court should treat with great skepticism the newly minted rationales presented by the Government in this case.[23] Instead, the Court should defer to the EEOC's longstanding position that § 633a encompasses a cause of action for retaliation.

Petitioner has ably documented "consistent and binding interpretations by the agencies charged with enforcing [§] 633a(a) ... that it bars retaliation against protected [federal] workers because those workers complain that they have been subjected to age discrimination." Pet'r Br. 31; *see id.* 31-32 ("from the

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[23] A skeptical perspective also is justified by the United States' apparent abandonment of a 30-year-plus practice of litigating § 633a retaliation claims, seemingly reflecting a longstanding view that such claims are valid. *See, e.g., Villescas v. Abraham*, 311 F.3d 1253, 1258 (10th Cir. 2002) (noting that "[t]he government accepts the existence of such a cause of action").

very first, the agency charged with enforcing § 633a(a)," the Civil Service Commission, "treated allegations of 'reprisal in connection with the presentation of a complaint' of ... discrimination as 'an individual complaint of discrimination'"); 32 (explaining that "after the EEOC assumed enforcement authority for the ADEA in 1978, it left these CSC regulations in place until 1992, when it issued regulations of its own," 29 C.F.R. §§ 1613.261-262(a) (1994), which once again deemed allegations of "unlawful reprisal [to be] reviewable as an individual complaint of discrimination"); 32-33 (citing "current EEOC regulations," and the EEOC Compliance Manual as providing that "[c]omplaints alleging retaliation prohibited by [statutes including the ADEA] are considered to be complaints of discrimination").

Indeed, EEOC regulations enforcing § 633a now provide: "No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act . . . [or] the Age Discrimination in Employment Act . . . or for participating in any stage of administrative or judicial proceedings under those statutes." 29 C.F.R. § 1614.101(b) (2007). Such rules explicitly state that Title VII and the ADEA both should be interpreted to afford a retaliation remedy to federal employees. *See id.* §1614.103(a) ("Complaints alleging retaliation prohibited by [title VII and the ADEA] are considered to be complaints of discrimination for purposes of this part."). Adopted in part pursuant to § 633a, these rules are entitled to deference by this Court. *See* Pet'r Br. 32 n.10. But the Government abruptly and inexplicably supports a different rule in this case, affording lesser protection for federal employees.[24]

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[24] Even in this case, the Government apparently at first conceded the existence of a cause of action for retaliation, and defended the U.S. Postal Service against Petitioner's claims by contending she had failed to present a prima facie case of age

The Government has a long record of administrative enforcement activity built on the premise that § 633a of the ADEA prohibits retaliation. As the enforcer of federal sector anti-discrimination statutes, EEOC's Office of Federal Operations ("OFO") routinely adjudicates federal employee retaliation claims based on § 633a, pursuant to 29 C.F.R. 1614.101(b).[25] *See, e.g.*, *Muller v. Caldera*, EEOC Doc. 019724325, 1998 WL 938245, at *4 (Dec. 30, 1998) (holding that "[i]t is well-recognized by the Commission that reprisal claims based solely on an underlying age discrimination claim falls under the Commission's jurisdiction"); *Habek v. Caldera*, EEOC Doc. 01990755, 1999 WL 909899, at *3 (Oct. 6, 1999) (reversing agency's dismissal of reprisal claim based on an underlying complaint of age discrimination pursuant to § 633a). Indeed, the OFO has established that the broad language of § 633a creates a statutory foundation for such claims. *See Gorman v. Chater*, EEOC Doc. 01966769, 1997 WL 73404, at *3 (Feb. 13, 1997) (finding that "the breadth of language of section 633a ... is sufficiently broad to prohibit age-related retaliation"). OFO consistently has entertained ADEA retaliation claims by federal employees against the U.S. Postal Service, among other federal entities. *See, e.g.*, *Avalos v. Potter*, EEOC Doc. 01A10765, 2002 WL 1212267, at

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discrimination. *See* Motion for Summary Judgment and Memorandum of Law In Support Thereof (CM ECF Docket No. 43) at 7-22, *Gomez-Perez v. Potter* (D. P.R. July 7, 2005) (No. 03-2236). In its reply brief supporting summary judgment, the Government changed course, adding a new argument that § 633a does not encompass a claim for retaliation. *See* Reply to Plaintiff's Opposition to Motion for Summary Judgment (CM ECF Docket No. 56) at 1-4, *Gomez-Perez v. Potter* (D. P.R. Aug. 30, 2005) (No. 03-2236).

[25] *See* 29 C.F.R. § 1614.109 (2007) (EEOC-administered hearing process for federal employees alleging employment discrimination).

*2 (May 21, 2002); *Pryor v. Runyon*, EEOC. Doc. 01931333, 1993 WL 1506760, at *2 (July 9, 1993).

The OFO not only has acknowledged that federal employees may bring retaliation claims under Title VII and the ADEA, but also has repeatedly reaffirmed its policy of liberally applying these protections. *See Encinas v. Potter*, EEOC Doc. 0120071981, 2007 WL 2470062, at *4 (Aug. 22, 2007) (noting, in case against the U.S. Postal Service, that "the Commission has a policy of considering reprisal claims with a broad view of coverage"); *Vincent v. Potter*, EEOC Doc. 01A61619, 2006 WL 2332500, at *1 (Aug. 3, 2006) (holding, in a case raising both ADEA and Title VII claims, that "under the Commission's broad view of reprisal" a complainant who had previously provided a statement to support a co-worker's claim and whose supervisor had merely threatened retaliation had set forth a valid retaliation claim); *Koch v. Pitt*, EEOC Doc. 01A03888, 2001 WL 1691867, at *8 (Dec. 21, 2001) (noting, in a case raising ADEA and Title VII claims, the Commission's "proclivity for generous dispensation of reprisal protection"). These decisions make clear EEOC's view that broad protection against retaliation is fundamental to eliminating age discrimination in the federal workplace. *See Gorman*, 1997 WL 73404, at *3 ("[A]n interpretation of § 633a that would merely recognize freedom from discrimination based on age, but does not provide for freedom from retaliatory measures taken for opposing any practice made unlawful by the ADEA, would be contrary to the mission of the Commission"); *Koch*, 2001 WL 1691867, at *8 (stating that a liberal application of the reprisal provision is necessary "if employees are to exercise their right to a workplace free from discrimination").[26/]

[26/] EEOC plainly has operated according to the same view of discrimination prohibited by Title VII. *See Rubio v. Henderson*, EEOC Doc. 01A02860, 2000 WL 1141228, at **2-3 (Aug. 1, 2000) (holding that broad interpretation of anti-

Finally, the Government vigorously urged this Court to recognize a retaliation claim under Title IX in *Jackson,* asserting, as Petitioner does here, that retaliation is an inherent component of intentional "discrimination." Brief for United States as *Amicus Curiae* Supporting Petitioner, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (No. 02-1672) [hereinafter *Jackson* Brief], 2004 WL 1900496, at *6. Yet roughly a year later, the United States argued below that "any discrimination based on age," in § 633a, must be "strictly construed" due to sovereign immunity law, and so, "simply cannot be read to cover retaliation." Brief for Appellee United States, *Gomez-Perez v. Potter*, 476 F.3d 54 (1st Cir. Aug. 14, 2006) (No. 06-1614) [hereinafter Brief for the Appellee], 2006 WL 4116684 at **23-24. The United States previously told this Court that Title IX's anti-bias goals "would be difficult, if not impossible, to achieve, if persons who complain about ... discrimination lacked adequate protection against retaliation." *Jackson* Brief, 2004 WL 1900496, at **12-13 (quoting *Cannon*, 441 U.S. at 704). And the United States persuaded the Court that the legislative context in which Title IX was enacted indicates that the law's general nondiscrimination language encompasses a retaliation claim. *Id. at* **10-12. These rationales apply with equal force to federal-sector age bias cases and strongly suggest § 633a contains a cause of action for retaliation.

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reprisal protection is essential "because the enforcement of Title VII depends on the willingness of employees to oppose unlawful employment practices"); *Whipple v. Derwinski*, EEOC Doc. 05910784, 1992 WL 1374312, at *5 (Feb. 21, 1992) ("[b]ecause the enforcement of Title VII depends on the willingness of employees to oppose unlawful employment practices or policies, courts have interpreted ... Title VII as intending to provide 'exceptionally broad protection' to those who oppose such practices").

Eliminating a claim for retaliation under § 633a by allowing the First Circuit's ruling to stand would seriously undermine effective protection from discrimination at work for older federal employees. In addition, it would endanger effective redress for workers of all ages protected by laws with broadly-worded prohibitions against "discrimination" in employment, that long have been understood and applied against retaliatory discrimination without specific text forbidding such retaliation. Without a right to challenge retaliation, many federal employees will be deterred from bringing age bias complaints for fear of reprisal. Still others, whose claims principally concern injuries related to retaliatory bias, will be completely denied the protection of § 633a. In short, "[i]f retaliation were not prohibited, [§ 633a's] enforcement scheme would unravel." *Jackson*, 544 U.S. at 180. This Court should not countenance such an unacceptable result.

CONCLUSION

For the reasons set forth above, the decision of the First Circuit should be reversed.

November 20, 2007

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IN THE

Supreme Court of the United States

MYRNA GOMEZ-PEREZ,
Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICUS*[1]

Amicus curiae, the National Treasury Employees Union (NTEU), is a federal sector labor organization representing approximately 150,000 federal employees in 31 agencies and departments nationwide,

[1] The parties have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

including the Internal Revenue Service, United States Customs and Border Protection, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and the Transportation Security Administration. NTEU routinely represents the legal interests of federal employees through the collectively bargained grievance-arbitration process, in administrative forums, and in federal court. Indeed, NTEU has frequently been a party or *amicus* before this Court on issues of vital interest to federal employees.[2]

NTEU and its membership have an important stake in the outcome of this case, which will determine whether federal workers will continue to enjoy their long-standing right to pursue claims alleging retaliation directly in federal district court under the Age Discrimination in Employment Act, 29 U.S.C. § 633a (ADEA). The First Circuit's decision[3] would deny federal employees this right, relegating these important claims to a variety of administrative forums subject, in most cases, to unreviewable prosecutorial discretion or to the union-controlled negotiated grievance-arbitration procedure. If allowed to stand, the decision not only would undermine the public policies that underlie the ADEA, but would

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[2] *See, e.g.*, *Whitman v. Dep't of Transp.*, 126 S. Ct. 2014 (2006); *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *NASA v. FLRA*, 527 U.S. 229 (1999); *National Fed'n of Fed. Employees, Local 1309 v. Dep't of Interior*, 526 U.S. 86 (1999) (NTEU attorneys represented union); *Gilbert v. Homar*, 520 U.S. 924 (1997) (NTEU attorney presented argument as *amicus*); *United States v. NTEU*, 513 U.S. 454 (1995); *NTEU v. Von Raab*, 489 U.S. 656 (1989); *Bowsher v. Synar*, 478 U.S. 714 (1986).

[3] The First Circuit's decision is set forth in the appendix to the petition for certiorari, at 1a-10a.

also result in inefficiencies, duplicative litigation, and potentially conflicting results when employees who seek judicial review of their underlying age discrimination claims are forced to pursue their retaliation claims in a separate administrative forum.

As the federal workforce ages, meaningful protection from age discrimination, including protection against retaliation, is becoming increasingly important to NTEU and its members. Accordingly, NTEU files this brief in support of the petitioner, urging reversal of the First Circuit's decision below.

SUMMARY OF ARGUMENT

I. The First Circuit's decision that the ADEA does not afford federal employees a statutory remedy for reprisal, including the right to raise such claims in district court, defies congressional intent and is inconsistent with the practice that has been followed in the federal sector for more than 30 years. When Congress extended the ADEA to the federal sector in 1974, except for claims arising under Title VII, federal employees had only the limited employment rights granted them by civil service regulations and executive orders. Those civil service rules provided only for administrative challenges to "adverse actions" (removals, suspensions of over 30 days, reductions in rank or pay, and furloughs). Because retaliation is most commonly accomplished through other methods (including, among others, imposing unfavorable working conditions, making significant changes in job duties, and denying promotions and other benefits), it is inconceivable that Congress intended to rely upon these general civil service regulations to accomplish its goal of removing barriers to the employment of older workers in the

federal sector. Rather, as every federal agency responsible for the administration of the relevant laws has concluded, when Congress extended the ADEA to the federal sector, it provided federal employees with the right to challenge reprisal directly under the ADEA, in federal district court.

II. Four years, after it extended the ADEA to the federal sector, Congress reaffirmed the importance of federal employees' statutory rights under the ADEA to challenge all forms of age discrimination, including reprisal, when it enacted the Civil Service Reform Act of 1978 (CSRA). While the CSRA created a new system of administrative remedies that federal employees could use to challenge personnel actions taken against them, it expressly preserved their pre-existing statutory right to direct judicial review under the anti-discrimination statutes, including the ADEA. The preservation of these judicial remedies is further evidence that Congress has consistently recognized the importance of ensuring access to federal district court for victims of all forms of invidious discrimination, including reprisal for filing age discrimination complaints.

III. The First Circuit's determination that the ADEA does not protect federal employees against reprisal for filing age discrimination complaints would seriously erode the enforcement of the ADEA in the federal sector and create significant practical difficulties. The current administrative remedies provided by the CSRA do not adequately protect against retaliation because, except in the limited category of "adverse actions," individual employees have no control over the pursuit of their reprisal claims and judicial review is unavailable. Further, large segments of the federal workforce would have

no remedy at all for retaliation related to age discrimination claims because they are excluded from some or all of the protections of the CSRA. Finally, the First Circuit's decision would create an unwieldy and duplicative process under which federal employees challenging age discrimination in district court would have to pursue their related reprisal claims in another forum, thereby raising the risk of conflicting resolution of similar issues in related cases. For these reasons, and for the reasons set forth in the petitioner's brief, the decision of the First Circuit should be reversed.

ARGUMENT

I. CONGRESS MUST HAVE INTENDED TO PROVIDE EMPLOYEES WITH PROTECTION AGAINST RETALIATION WHEN IT EXTENDED THE ADEA TO THE FEDERAL SECTOR IN 1974 BECAUSE SUCH PROTECTION WAS NOT AVAILABLE EXCEPT IN VERY LIMITED CIRCUMSTANCES UNDER THEN-EXISTING CIVIL SERVICE REGULATIONS

Congress amended the ADEA in 1974 to extend the Act's prohibition on age discrimination to the federal sector workplace. *See* Fair Labor Standards Amendments, Pub. L. No. 93-259, § 28, 88 Stat. 55, 79 (1974). As amended, the ADEA provides that "[a]ll personnel actions affecting federal employees . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). In expanding the ADEA to the federal workforce, Congress intended to "remove discriminatory barriers against employment of older workers in government jobs. . . ." H.R. No. 93-913, *reprinted in* 1974 U.S.C.C.A.N. 2811, 2850.

Providing effective protection against retaliation is critical to removing discriminatory barriers against the employment of older workers, just as it is essential to achieve the purposes of other anti-discrimination laws. Indeed, it is NTEU's experience that federal workers often—and with good cause—fear reprisal for asserting a wide range of statutory rights and will refrain from doing so unless they are assured of meaningful legal protection against retaliation.

As we show below, when Congress extended the ADEA to the federal sector in 1974, existing civil service regulations did not provide a full remedy for retaliation except in connection with claims filed under Title VII. *See* 37 Fed. Reg. 22,717 (Oct. 21, 1972). In fact, then-existing civil service protections covered a limited universe of employment-related decisions, and they did not encompass many of the most common methods through which reprisal is effected. *See* 5 C.F.R. Pt. 752 (1970). It is inconceivable, therefore, that the 1974 Congress did not intend to provide federal employees statutory protection against retaliation for filing age discrimination complaints. The decision of the First Circuit, accordingly, must be reversed.

A. At the time Congress extended the ADEA to the federal workforce, federal employment was governed by the "haphazard arrangements for administrative and judicial review of personnel actions" that preceded the enactment of the Civil Service Reform Act of 1978 (CSRA). *United States v. Fausto*, 484 U.S. 439, 444 (1988). These arrangements were part of the much-criticized "'outdated patchwork of statutes and rules built up over almost a century' that was the civil service

system." *Id.* at 444 (quoting S. Rep. No. 95-969, at 3 (1978)); *see also id.* at 445 (quoting S. Rep. No. 95-969, at 9) (appeals processes criticized as "lengthy" and "complicated," and judicial review was "wasteful and irrational," yielding varying results on the same or similar matters).

Under that pre-CSRA system, employee appeals of agency personnel actions (other than claims alleging discrimination in violation of Title VII) were governed by Executive Orders 10,987 and 11,491, as well as by regulations promulgated by the Civil Service Commission (CSC). *See* E.O. 10,987 (Jan. 17, 1962); E.O. 11,491, § 22 (Oct. 29, 1969); 5 C.F.R. Pt. 752 (1970). The appeals system was designed by the Executive Branch and, unlike the current statutory civil service system, could be unilaterally revoked or modified by the President. As crafted by the Executive Branch, this system afforded federal employees very limited opportunities to secure outside review of employment actions taken against them. At best, employees could appeal personnel actions with the CSC, but only if they had been subjected to one of four specified "adverse actions" (*see* 5 C.F.R. § 752.104(a) (1970)),[4] i.e., a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay. *See* 5 U.S.C. § 7511(2) (1970); 5 C.F.R. § 752.201(b) (1970). Many

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[4] At the time the ADEA was extended to the federal sector, adverse actions could not be challenged through a negotiated grievance procedure. *See* E.O. 11,491, § 22; Fed. Personnel Mgt. Project, Option Paper No. 4 (Sept. 20, 1977), *reprinted in* Legis. History of the Fed. Serv. Labor-Mgt. Relations Statute, Title VII of the Civil Service Reform Act of 1978, 1351, 1371 (1979); Richard A. Merrill, *Procedures for Adverse Actions Against Fed. Employees*, 59 Va. L. Rev. 196, 209-210 (Feb. 1973).

employees lacked recourse even in these circumstances because they were exempted from civil service protections by executive order or regulation.[5]

Moreover, the standard for determining the legitimacy of agency decisions within this limited universe of "adverse actions" was phrased in general terms under the system that was in place in 1974. The CSC had the authority to order agencies to withdraw an adverse action if it concluded that it was not taken "for such cause as will promote the efficiency of the [civil] service." *See* 5 C.F.R. §§ 752.104(a), 752.401 (1970). As of 1974, however, the CSC regulations contained no specific remedies for reprisal, except in the context of Title VII, and those remedies stemmed from Congress' extension of that law to the federal sector two years earlier.[6] *See* Equal Employment Opp'y Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

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[5] *See* E.O. 10,987 at § 5(a) ("This order shall not apply to the Central Intelligence Agency, the National Security Agency, the Atomic Energy Commission, and the Tennessee Valley Authority"); 5 C.F.R. § 752.102(a) (1970) (CSC regulation excluding several classes of employees from adverse action rules, including, among others, those on probationary or trial periods, temporary and term appointment employees, and most employees of the legislative or judicial branch); E.O. 11,491 at § 22 (adverse action rights extended to non-veteran employees in accordance with CSC regulations).

[6] While employees pursuing appeals of adverse actions were to "[b]e assured freedom from . . . reprisal," under the general civil service regulations in effect in 1974, *see* 5 C.F.R. § 771.211(a) (1965), there was no remedy provided for violation of this general provision. Moreover, the "assurance" was only against reprisal occurring in connection with appeals of *adverse actions* before the CSC, not the filing of discrimination claims.

In NTEU's experience, the most common tools of retaliation fall short of punitive actions such as removals or demotions. Instead, reprisal is usually effected by methods such as giving employees poor performance appraisals, denying them promotions or other job benefits, and making undesirable changes in their duties or working conditions. *See* EEOC Compl. Manual, 8-II(D)(1) (May 20, 1998).[7] None of these methods involve "adverse actions." Therefore, if Congress had not intended to provide employees with statutory protection against retaliation for filing age discrimination complaints when it extended the ADEA to the federal workforce in 1974, it would have left federal employees without recourse where they suffered the most common forms of reprisal.

B. Given this state of affairs, it is simply implausible to contend that Congress did not intend to provide meaningful protection against retaliation to federal employees who filed ADEA claims. Indeed, as petitioner describes in her brief (at 21-24), Congress had already shown its dissatisfaction with the existing patchwork system of remedies when it extended Title VII to the federal sector in 1972. Congress had not been content to relegate claims of race discrimination or related retaliation to the outmoded and ineffective system; it charged the CSC with enforcing the new statutory prohibitions

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[7] Other non-"adverse actions" that are used to effect illegal retaliation include "threats," "reprimands," and "harassment or other adverse treatment." EEOC Compl. Manual, 8-II(D)(1) (May 20, 1998); *see also Shaw v. Blair*, 2007 EEOPUB LEXIS 3338 (citing *Roberts v. Dep't of Transp.*, EEOC Appeal No. 01970727 (September 15, 2000)) ("It is also well-settled that harassment based on an individual's prior EEO activity is actionable.")

through new regulations. The notion that it intended that any less protection would be provided for age discrimination claims defies common sense and is inconsistent with the views of every administrative agency to have considered the issue over the last 30 years (including the CSC, which issued regulations to prohibit reprisal shortly after the ADEA was extended to the federal workforce in 1974).[8]

II. WHEN CONGRESS ENACTED THE CSRA IN 1978, IT EXPRESSLY PRESERVED FEDERAL EMPLOYEES' RIGHTS TO PURSUE RELIEF IN COURT UNDER THE ADEA

Four years after it extended the protections of the ADEA to the federal workforce, Congress enacted the Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978). The CSRA created a "new framework for evaluating adverse personnel actions against [federal employees]." *Fausto*, 484 U.S. at 443.

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[8] *See Gorman v. Sec'y of Health & Human Serv., Soc. Sec. Admin.*, 1997 EEOPUB LEXIS 459 (decision of Equal Employment Opportunity Commission holding that ADEA prohibits retaliation against federal employees); 29 C.F.R. § 1614.101(b) (2007) (acknowledging EEOC jurisdiction over complaints of retaliation brought under the ADEA); *Parnell v. Department of the Army*, 58 M.S.P.R. 128 (1993) (Merit Systems Protection Board holding that statutory prohibition on discrimination based on, among other things, age encompasses a claim of retaliation); 5 C.F.R. § 1810.1 (2007) (Office of Special Counsel policy of referring to the EEOC complaints alleging that an agency committed a prohibited personnel practice by discriminating against an employee); http://www.osc.gov/documents/forms/osc11.htm (last visited on October 30, 2007) (complaint form noting that claims of reprisal arising from employees' pursuit of relief under anti-discrimination statutes are included in the referral policy).

Significant for purposes of this case, while the CSRA allows employees to raise complaints alleging discrimination or related retaliation through its administrative procedures, Congress expressly preserved federal employees' pre-existing remedies, including the right to district court review, for claims that are grounded in Title VII, the ADEA, the Equal Pay Act, and the Rehabilitation Act. *See* 5 U.S.C. § 2302(d)(2). Section 2302(d)(2) of the CSRA thus provides that the CSRA's procedures for challenging "prohibited personnel practices" (which include statutorily prohibited forms of discrimination as well as retaliation for pursuing complaints involving such discrimination)[9] "shall not be construed to extinguish or lessen . . . any right or remedy available to any employee or applicant for employment in the civil service" under the anti-discrimination statutes, including "section 12 and 15 of [the ADEA] . . . prohibiting discrimination on the basis of age. . . ." *Id.*

This explicit language guaranteeing access to the pre-existing statutory causes of action under the anti-discrimination statutes further evinces a congressional policy of providing federal employees a complete set of remedies, including the right to bring an action in district court, for violations of Title VII and the ADEA. Indeed, the CSRA preserved the unique provision of the ADEA that permits federal employees to pursue a civil action in court without exhausting any administrative remedies at all, an opportunity for immediate judicial review that is not available under other anti-discrimination statutes.[10]

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[9] *See* 5 U.S.C. §§ 2302 (b)(1), (b)(9)

[10] *See* 29 U.S.C. § 633a(d) (providing that civil action may be pursued without filing administrative complaint first, as long as

The solicitude with which Congress treated employment claims grounded in the anti-discrimination statutes, and specifically in the ADEA, undermines the inherent premise of the First Circuit's decision in this case—that Congress intended claims of reprisal to be addressed exclusively through administrative procedures.

III. THE FIRST CIRCUIT'S DECISION WOULD DEPRIVE FEDERAL EMPLOYEES OF ADEQUATE PROTECTION AGAINST REPRISAL FOR FILING ADEA CLAIMS AND WOULD RESULT IN WASTE AND INEFFICIENCY ARISING OUT OF THE BIFURCATED CONSIDERATION OF AGE AND REPRISAL CLAIMS

Despite Congress' clear intent that the CSRA not affect employees' rights to pursue anti-discrimination claims in district court, under the First Circuit's decision, federal workers' claims of retaliation for filing age discrimination claims would be relegated to the administrative procedures established under the CSRA. This result is extremely problematic for a number of reasons. First, as outlined below (at 14-20), employees lack control over the pursuit of most retaliation claims under the CSRA's administrative processes and have no right to judicial review, except in limited circumstances. Second, a

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plaintiff provides EEOC 30 days' notice of intent to sue); 29 C.F.R. § 1614.201(a) (2007); *Matheny v. Ashcroft*, 2005 EEOPUB LEXIS 1921 (noting that the ADEA "does provide for an opt-out provision, whereby a complainant is able to proceed directly to District Court, instead of first proceeding through the administrative process, after providing notice to the Commission").

sizable portion of the federal workforce, including postal employees like the petitioner, does not have access to some or even any of the CSRA's administrative remedies. Third, the government's argument creates inefficiencies and anomalies in the prosecution of EEO cases in the federal sector by making it impossible for employees to pursue their age discrimination and retaliation claims in the same forum without sacrificing their right to pursue their underlying age discrimination claims in district court.

A. The Remedies Available Under the CSRA Do Not Afford Adequate Protection Against Retaliation for Filing Age Discrimination Complaints

As mentioned, in enacting the CSRA, Congress established a new administrative scheme for addressing employment disputes. Federal employees can raise claims of retaliation for filing an ADEA complaint within that scheme. As described below, however, the procedures and remedies available under the CSRA are inadequate and inferior to the right of action provided by the ADEA, which is undoubtedly why Congress chose to preserve the pre-existing remedies available to federal employees under the ADEA when it enacted the CSRA.

1. As under the pre-CSRA system (*see, supra, at 6-9*), employees may obtain administrative review of adverse actions. *See* 5 U.S.C. §§ 7513(d), 7701. Such review is obtained by filing an appeal with the MSPB. *See id.* Judicial review of the MSPB's decision in adverse action Cases is available in the Federal Circuit, under a deferential appellate standard. *See id.* at § 7703(b)(1) (Board's decisions on adverse

actions appeals reviewable in the U.S. Court of Appeals for the Federal Circuit).

A special procedure applies to "mixed cases," in which an employee asserts discrimination as a defense to an adverse action. *See Valentine-Johnson v. Roche*, 386 F.3d 800, 805-06 (6th Cir. 2004). As the D.C. Circuit has described, Congress adopted a "complicated tapestry" for mixed cases, with judicial review available at the end, either in the district court or the Federal Circuit. *See Butler v. West*, 164 F.3d 634, 638-39 (D.C. Cir. 1999), *quoted in Valentine-Johnson*, 386 F.3d at 805-06.

The "mixed cases" procedures are currently available to federal employees alleging retaliation under the ADEA. Under the First Circuit's decision, however, such cases would be treated as pure adverse action cases, with review in the Federal Circuit. While employee in adverse action cases would thus have at least some form of judicial review, the fundamental problem remains: retaliation normally does not take the form of an adverse action and employees would therefore be limited to the inferior "prohibited practice" remedies discussed below.

2. The CSRA treats retaliation that does not take the form of an "adverse action"[11] as a "prohibited personnel practice" under 5 U.S.C. § 2302(b)(9)(A). That provision makes it a prohibited personnel practice to "take or fail to take . . . any personnel

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[11] When it enacted the CSRA in 1978, Congress reduced from 30 to 14 the number of days of a suspension that would constitute an "adverse action" and specified that a furlough would only be considered an adverse action if it lasted no more than 30 days. *See* 5 U.S.C. § 7512. The other adverse actions —removal and reduction in grade/rank or pay—remained unchanged.

action against any employee or applicant for employment because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation." *Id.* The procedures provided by the CSRA to challenge prohibited personnel practices are not within the control of injured employees. Further, judicial review of claims alleging the commission of prohibited personnel practices is generally unavailable.

a. Most (but not all)[12] federal employees may pursue a prohibited personnel practice claim by filing a complaint with the United States Office of Special Counsel (OSC). *See* 5 U.S.C §§ 1212(a)(2), 1215. OSC regulations provide, however, that the agency defers prohibited personnel practice complaints alleging discrimination under Title VII or the ADEA to the EEO process. *See* 5 C.F.R. § 1810.1 (2007). Further, like the other agencies responsible for addressing discrimination-related disputes in the federal sector (EEOC and MSPB), OSC considers complaints alleging retaliation for filing an ADEA complaint to be encompassed by the ADEA; accordingly it defers retaliation complaints to the EEO process as well. *See, supra,* at 10 n.8.

Assuming OSC were incorrect in deferring retaliation claims under the ADEA to the EEOC, its procedures for resolving complaints alleging the commission of prohibited personnel practices would be inadequate to protect age discrimination complainants who suffer retaliation. Under Title 5, if OSC determines after an investigation that there are reasonable grounds to believe that a prohibited

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[12] Employees of government corporations, for example, may not file complaints with OSC. *See, infra,* at 22-23.

personnel practice has occured, it may recommend that an agency take corrective action. *See* 5 U.S.C. § 1214(a); § 1214(a)(1)(A), (b)(2)(B). It may exercise its discretion to petition the MSPB to order the agency to take corrective action where the agency declines to do so voluntarily. *See id.* at § 1214(b)(2)(C). OSC is not required to pursue cases where an agency declines to voluntarily provide relief, however, and there is no judicial review of OSC's decision not to pursue a prohibited personnel practice complaint. *See* 5 U.S.C. § 1214(c) (providing for judicial review only of final orders or decisions of the MSPB); *see also Carson v. United States Off. of Spec. Couns.*, 2006 U.S. Dist. LEXIS 17055 (D.D.C.), *appeal dismissed*, 2006 U.S. App. LEXIS 20690 (noting that only under extraordinary circumstances may OSC actions be challenged in court by mandamus, and mandamus action not available to challenge OSC's discretionary determinations). Statistics show, in fact, that only a very small percentage of prohibited personnel practice complaints are ever actually prosecuted by OSC.[13]

If OSC declines to petition the MSPB for corrective action, or closes the case because it finds no reasonable basis to believe a prohibited personnel practice has occurred, the employee has no further

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[13] *See* U.S. Off. of Spec. Couns. Fiscal Yr. 2006 Annual Rep., at 27, available at http://www.osc.gov/documents/reports/ar-2006.pdf (last visited on Oct. 17, 2007) (showing that OSC sought an order from the Board directing an agency to take corrective action in three cases during the five-year period running from 2002-2006); *id.* at 22 (showing that during the same five-year period, 8889 complaints of prohibited personnel practices were received by OSC).

recourse.[14] Thus, if a federal employee files a complaint with OSC alleging a prohibited personnel practice under 5 U.S.C. § 2302(b)(9) based on retaliation arising from pursuit of an age discrimination complaint, he or she would have to rely entirely on OSC's willingness to seek relief on his or her behalf. Moreover, judicial review would be available only in the rare instances where: (a) OSC investigates the complaint and finds reasonable cause to believe that a prohibited personnel practice occurred; (b) OSC recommends that the agency take corrective action; (c) the agency declines to take the corrective action; (d) OSC petitions the MSPB to order the agency to take the action; and (e) the MSPB declines to order the agency to take the corrective action. *See* 5 U.S.C. §§ 1214(c), 7703.

b. Prohibited personnel practice complaints may also be pursued through the negotiated grievance-arbitration procedure by employees who are covered by collective bargaining agreements. *See* 5 U.S.C. § 7121(g). But that procedure, like the OSC process, similarly divests the victim of retaliation of control over his or her claim.

Thus, if the grievance is denied, only the union has the authority to invoke arbitration. *See* 5 U.S.C. § 7121(b)(1)(C)(iii). The union's statutory obligation is to represent the collective interests of its members; it may reasonably decide not to pursue arbitration over the objection of the employee based on considerations such as limited resources, com-

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[14] Except in cases involving retaliation for whistleblowing under 5 U.S.C. § 2302(b)(8), employees may not pursue an individual right of action before the MSPB to challenge the commission of a prohibited personnel practice.

peting interests, and a desire to maintain harmony among employees and their employer. *See* 5 U.S.C. § 7114(a)(1); *see also Pyner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir.), *cert. denied*, 522 U.S. 912 (1997). If the union were to decline to invoke arbitration, the matter would be closed, because the employee would be barred from pursuing any other remedy. *See* 5 U.S.C. § 7121(d), (g)(1) (providing that employee may elect to pursue a prohibited personnel practice claim through either the negotiated grievance process or the statutory process, but not both). So long as the union does not engage in invidious discrimination, its decision whether to invoke arbitration is virtually unreviewable.[15]

Moreover, even if the union were to invoke arbitration, arbitral proceedings are informal and discovery is extremely limited.[16] An arbitrator also

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[15] *See Am. Fed'n of Gov't Employees, Local 3529 and Cyncynatus*, 31 F.L.R.A. 1208, 1224 (1988) ("[W]here union membership is not a factor, the standard for determining whether an exclusive representative has breached its duty of fair representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee.")

[16] *See* Mandatory Binding Arb. & Employment Discrim. Suits, EEOC Compl. Man. (BNA) No. 226 at N:3104; Reginald Alleyn, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Lab. L. J. 381, 411 (1996). *Accord, Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995) (noting

lacks the broad remedial authority available under the ADEA when he or she instead resolves a claim of retaliation as a prohibited personnel practice. When resolving a claim brought under the ADEA, the arbitrator stands in the shoes of the court and may award make-whole relief, including for example, front pay.[17] On the other hand, his or her authority for remedying prohibited personnel practices is derived from the Back Pay Act, 5 U.S.C. § 5596, and is limited to ordering relief that reconstructs what the agency would have done had it not violated the law, which could not include an award of front pay. *See United States Dep't of Treas., Bureau of Engraving & Printing, Washington, DC and NTEU*, 53 F.L.R.A. 146 (1997).

Finally, if the grievance is arbitrated and if the union does not prevail, an employee has the right to seek judicial review only if the retaliation took the form of an adverse action.[18] Otherwise, it is up to the union alone to decide whether to appeal the arbitrator's decision by filing exceptions with the Federal Labor Relations Authority (FLRA). *See* 5 U.S.C. §§ 7121(b)(1), 7122. Judicial review of the

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remedies and procedural protections in arbitration differ significantly from those available in litigation).

[17] *See Lewis v. Fed. Prison Industries, Inc.*, 953 F.2d 1277, 1279 (11th Cir. 1992), *cf. United States Dep't of Just., Fed. Bureau of Prisons, Metropolitan Detention Ctr., Guaynabo, PR and Am. Fed'n of Gov't Employees, Council of Prisons Local, Local 4052*, 59 F.L.R.A. 787, 792-93, *reconsideration denied*, 60 F.L.R.A. 88 (2004) (noting that arbitrator has broader authority to order relief under Title VII than he would if grievance alleged only a contractual violation).

[18] Arbitrator decisions on adverse actions are reviewable directly in the Federal Circuit, just as MSPB decisions are. *See* 5 U.S.C. § 7121(f).

FLRA's decisions on exceptions to arbitral awards would not be available for retaliation claims, because such claims do not involve an unfair labor practice. *See id.* at §§ 7116(a)(1)-(8), 7123.

Given these features of the grievance-arbitration process, this Court has long held that it would be contrary to the congressional policies that underlie the anti-discrimination laws to relegate individual employees to the collectively bargained grievance-arbitration procedure to vindicate their statutory rights. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (observing that "Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. . . . [O]f necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.")[19] The Court's recognition of the limitations of the grievance-arbitration mechanism strongly counsels against the First Circuit's conclusion that federal employees have no right under the ADEA itself to challenge retaliation.

B. Because There Are Gaps in the CSRA's Coverage, Many Federal Employees Would Have No Remedy at All for ADEA Retaliation Under the First Circuit's Holding

Not only does the CSRA's remedial scheme afford inadequate protection from retaliation, but there are tens of thousands of federal employees who lack access

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[19] *See also Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743 (1981) (FLSA); *Pyner*, 109 F.3d at 362 (anti-discrimination statutes).

to all or some of its remedies, such as they are. For those employees, their only protection against all or most forms of retaliation arising from pursuit of an age discrimination claim is that afforded by the ADEA.

1. The CSRA expressly exempts several agencies from coverage of its provisions that would otherwise have afforded employees of those agencies an administrative remedy if they were subjected to illegal retaliation arising from pursuit of an age discrimination claim. *See* 5 U.S.C. §§ 2302(a)(2)(C)(ii); 7103(a)(3); 7511(b)(7), (8) (exempting, among others, the Government Accountability Office, Federal Bureau of Investigation, Central Intelligence Agency, National Security Agency, and Tennessee Valley Authority). Employees of these agencies cannot bring retaliation complaints to OSC, cannot engage in collective bargaining (and therefore have no negotiated grievance remedy), and cannot appeal adverse actions to the MSPB. They can, however, bring claims against their agencies under anti-discrimination statutes. *See, e.g.*, 29 U.S.C. § 633a(a) (making ADEA applicable to *all* executive agencies, as defined in 5 U.S.C. § 105, and to certain non-executive agencies, such as GAO). The ADEA, therefore, offers the only source of protection from retaliatory personnel actions taken against individuals in these agencies who complain of age discrimination.[20]

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[20] The ADEA is also the only source of a retaliation remedy for 43,000 Transportation Security Officers (TSOs) working as airport screeners for the Transportation Security Administration (TSA). When Congress created TSA, it authorized the agency to exempt its screeners from the CSRA's coverage. TSOs, therefore, may not seek relief under the CSRA's administrative procedures or under a union-negotiated contract.

2. Employees of government corporations, such as the Federal Deposit Insurance Corporation (FDIC) (*see* 5 U.S.C. § 103), also rely on the ADEA for protection from retaliation. *See* 29 U.S.C. § 633a(a) (incorporating definition of "executive agency" in 5 U.S.C. § 105, which includes "Government corporations"). While government corporation employees may appeal adverse actions to the MSPB (*see* 5 U.S.C. § 7511(b)), they may not file a complaint with OSC in the event they face retaliation that is manifested as something other than an adverse action. *See* 5 U.S.C. § 2302(a)(2)(C)(i). Accordingly, if the Court were to adopt the interpretation of the ADEA offered by the government in this case, employees of government corporations would have no legal or administrative remedy for retaliation arising from pursuit of an age discrimination complaint that takes a form other than an adverse action.[21] As

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See Conyers v. MSPB, 388 F.3d 1380 (Fed. Cir.), *reh'g and reh'g en banc denied*, 2004 U.S. App. LEXIS 27471, *cert. denied*, 543 U.S. 1171 (2005) (MSPB lacks jurisdiction to consider appeal filed by screener); *Am. Fed'n of Gov't Employees v. Loy*, 367 F.3d 932 (D.C. Cir. 2004) (upholding directive declaring TSA screeners ineligible to participate in collective bargaining). They have, however, obtained relief for retaliation under anti-discrimination statutes. *See Loomis v. Chertoff*, 2007 EEOPUB LEXIS 2299; *Hitchcock v. Chertoff*, 2007 EEOPUB LEXIS 1654. If no retaliation remedy was available under the ADEA, then TSOs would be without any recourse if they are subjected to retaliation for having pursued an ADEA complaint.

[21] Employees in government corporations who are represented by a union may have a contractual remedy for such retaliation. For example, a contractual remedy would be available to the 3000 NTEU-represented employees of the FDIC. For the reasons discussed above (at 17-20), grievance remedies do not afford adequate protection from retaliation for filing age discrimination complaints.

discussed above (at 6-10), that result would be contrary to Congress's intent to eliminate barriers to federal employment for older workers.

3. Postal Service employees are also largely exempt from Title 5. Under the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970), which has been in place at all times relevant to this lawsuit, only some postal workers have access to any kind of remedy under Title 5. *See Hall v. United States Postal Serv.*, 26 M.S.P.R. 233, 235-36 (1985). Management officials and employees with a veterans preference (called "preference eligibles," *see* 5 U.S.C. § 2108(3)) may appeal adverse actions imposed by the Postal Service to the MSPB. *See* 39 U.S.C. § 1005(a)(2), (4); *Hall*, 26 M.S.P.R. at 235-36 (citing *Bredehorst v. United States*, 677 F.2d 87, 88-89 (1982)). The same judicial review provisions applicable to MSPB decisions concerning non-postal employees apply. *See, supra,* at 13-14. Bargaining unit employees who are not "preference-eligibles" may not pursue appeals of adverse actions before the Board. *See Hall*, 26 M.S.P.R. at 235-36 (citing *Winston v. United States Postal Serv.*, 585 F.2d 198, 206 (7th Cir. 1978)).

There is no remedy under the CSRA for any postal worker who wishes to challenge a retaliatory action that does not constitute an adverse action. *See Booker v. MSPB*, 982 F.2d 517, 519 (Fed. Cir. 1992), *cert. denied*, 510 U.S. 862 (1993) (Postal Service is not an "agency" subject to the prohibited personnel practice provisions of 5 U.S.C. § 2302); *see also* http://www. osc.gov/ppp.htm#q4 (last visited Oct. 17, 2007) (noting that OSC has no jurisdiction over Postal Service employees except to address nepotism charges). The only remedies for these types of actions

for bargaining unit employees are those available under the negotiated grievance procedures, assuming their union has successfully negotiated contractual protections from reprisal arising from pursuit of an age discrimination claim. As discussed above (at 17-20), relegating retaliation claims to the negotiated grievance process is inconsistent with Congress' goal of eliminating barriers to federal employment for older workers.

C. The First Circuit's Decision Would Result in Inefficiencies and the Inconsistent Adjudication of ADEA Claims by Forcing Related ADEA Claims Arising Out of the Same Operative Facts To Proceed on Separate Litigation Tracks

Under current law, a federal employee may pursue an age discrimination claim and a related retaliation claim simultaneously, in a consolidated action, first through the EEO process and then in district court. Under the First Circuit's decision, however, if an employee filed an age discrimination charge with the EEOC or pursued a claim in district court, neither the EEOC nor the court would have jurisdiction over the retaliation claim. The retaliation claim would have to be pursued through an appeal with the MSPB (if it involved an adverse action), or through filing a complaint with OSC or a grievance under the union contract, as described above.

This unwieldy bifurcated approach to litigating inextricably linked claims wastes the resources of all involved. There are common elements of proof in both age discrimination and retaliation claims. For example, in order to prove retaliation, the com-

plaining party must show a good faith reasonable basis for his or her underlying claim of age discrimination.[22] Further, the same witnesses often have material information about both the underlying age claim and the retaliation claim, and both claims often involve a series of related events. Under the First Circuit's approach, however, unless an employee gave up his or her critical right to pursue his age claim through the EEO process that culminates with a right to go to district court, different tribunals would be deciding the same or similar issues. This process would be wasteful and duplicative and could easily result in conflicting interpretations of the law in a single case.

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[22] *See, e.g., Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007); *Weeks v. Harden Mfg. Co.*, 291 F.3d 1307, 1311-12 (11th Cir. 2002).

CONCLUSION

For the foregoing reasons, *amicus curiae* NTEU hereby requests that the Court reverse the decision of the court of appeals and rule in favor of the petitioner Gomez-Perez.

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